

# **Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues**

(International Colloquium Section 4,  
Basel, 21-23 June 2017)



# Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues

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## INTRODUCTION

*By Sabine Gless \**

Section VI of the XX AIDP International Congress of Penal Law focuses on jurisdictional questions with regard to criminal liability of enterprises. The reports add to the general topic of corporate accountability through an analysis of national rules governing the reach of domestic penal power and how they establish liability for crimes committed by corporations along a supply chain.

The expert group addressed different complex issues at stake. The first challenge was to capture criminal accountability for a non-human entity by exploring domestic law around criminal liability of corporations, including the complicating factor of alleged crimes committed by suppliers or in corporate groups. Secondly, the experts faced the demanding task of explaining the relevant jurisdictional rules with regard to crimes allegedly committed when doing business abroad, including the scope of the territoriality principle, personality principles, the vicarious principle, and universal jurisdiction. I am immensely grateful to Ivory Radha and Anna John (Australia), Ingeborg Zerbes (Austria), Rodrigo de Souza Costa and Renata da Silva Athayde Barbosa (Brazil), Zhenjie Zhou (China), Dan Helenius (Finland), Juliette Lelieur (France), Martin Böse (Germany), Gabriella Di Paolo (Italy), Cedric Ryngaert and Emma van Gelder (Netherlands), Gleb Bogush and Vitaly Beloborodov (Russia), Ángeles Gutiérrez Zarza (Spain), Per Hedvall and Ashraf Ahmed (Sweden), Mark Pieth (Switzerland), Sara Sun Beale (USA) and Kenneth Gallant of the University of Arkansas (USA) who have submitted reports and doing so, provided excellent information and the basis for our common work.

Jurisdictional issues are naturally framed in a national perspective. In 1891, Lord Halsbury LC could assert with confidence that '[a]ll crime is local.'<sup>1</sup> However, it is well known that not only has the face of crime changed considerably, but also the public perception of responsibility for cross-border situations. States have established various conventions defining treaty crimes, for instance in the fight against transnational organized crime. Civil society in many states calls for incrimination of certain cross-border wrongdoing. The adoption of the UN Guiding Principles on Business and Human Rights of 2011,<sup>2</sup> which address the potential adverse impact on human rights linked to business activity, prominently fell into step with domestic movements in Western states, exemplified by the

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<sup>1</sup> *MacLeod v Attorney-General for New South Wales* [1891] AC 455, 458.

<sup>2</sup> <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> accessed 28 March 2018.

Swiss 'Konzernverantwortungsinitiative'<sup>3</sup> or the Australian initiative against modern slavery in supply chains.<sup>4</sup>

Such legislative projects, whether they include criminal or civil law, go beyond established principles and against conventional jurisdictional rules established for human beings, particularly those in criminal law. This is a necessary step today because many believe that causal chains for conduct outlawed internationally through special treaties<sup>5</sup> stretch across borders and fact patterns implicate alleged perpetrators in various jurisdictions in the shape of a corporation. Nevertheless, that actors and acts transcend national borders leads to a somewhat paradoxical situation; while the issue of criminal jurisdiction over transnational crimes is, by definition, transnational, the rules by which it is governed are primarily shaped at the domestic level.<sup>6</sup> This points to the core problem addressed throughout this issue, which is at the heart of the General Report: what are the domestic possibilities to adjudicate corporations for alleged crimes connected to incidents abroad?

For the purpose of drafting the General Report, a questionnaire was provided to the national AIDP Groups. Its preamble frames the topic in the perspective of the recent discussion on criminal liability of corporations for severe crime committed abroad; that is, jurisdiction must be based on a link between the alleged crime and the competence of the state that exercises judicial authority. Following the Westphalian sovereignty logic, territory has served as the predominant link, after gradually replacing the personality principle. In criminal law, however, concurrent jurisdictional claims have always been present and have recently gained new status due to the movement of holding corporations accountable not only for domestic but also for international *core crimes* (those included in the jurisdiction of the International Criminal Court, ICC), as well as *treaty crimes* (for instance, corruption, environmental crimes, trafficking crimes, financial crimes, tax crimes, etc.). When the U.N. Human Rights Council set a global standard by adopting the United Nations Guiding Principles on Business and Human Rights, not only did it assign to states a duty to protect human rights, but it included the duty to obligate corporations, and to provide legal remedies to victims of business-related abuses.

The experts in the current project were asked to explain their country's approach to jurisdictional issues related to Corporate Criminal Responsibility (CCR), focusing on cases of alleged international law violations by corporations, with a special emphasis on extraterritorial jurisdiction. The questionnaire, however, also inquired about the general

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<sup>3</sup> <<http://konzern-initiative.ch>> accessed 28 March 2018.

<sup>4</sup> <<http://www.ag.govau/Consultations/Pages/modern-slavery-in-supply-chains-reporting-requirementpublic-consultation.aspx>> accessed 7 September 2017.

<sup>5</sup> UN Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000 and its protocols; UN Convention on the Elimination of All Forms of Discrimination Against Women adopted by General Assembly resolution 34/180 of 18 December 1979; UN Convention on the Rights of the Child adopted by General Assembly resolution 44/25 of 20 November 1989; UN International Convention on the Rights of Persons with Disabilities adopted by General Assembly resolution 61/106 of 13 December 2006..

<sup>6</sup> Anna Petrig, 'The expansion of Swiss criminal jurisdiction in light of international law', *Utrecht Law Review*, 34-55.

framework of national law as the basis of cross-border prosecution of white-collar crime. Experts described their country's general rules and laws on jurisdiction with regard to transnational crime and its underlying rationale with a special focus on whether jurisdiction over corporations has changes during recent decades. For instance, can companies be held liable under the active personality principle, and if so how is a corporation's nationality established (e.g., control theory, place of registration)?

A lively debate about accountability for supply chains in different areas has triggered a controversial judicial debate about responsibilities, transnationalisation of rights, the advancements of rights in transnational business and the question of shared accountability and its consequences for criminal law, and in particular the shaping of jurisdictional rules.<sup>7</sup>

The approach adopted in the General Report relies on a mix of comparative methods:<sup>8</sup> It firstly looks at laws governing criminal liability of companies and the relevant jurisdictional rules and then secondly shifts to a functional comparative approach. Where applicable, specific situations were used to highlight relevant concepts, including when victims of an alleged crime seek redress abroad because their domestic system is either unwilling or incapable of serving their needs and when extraterritorial jurisdiction abroad promises that perpetrators will be held accountable. Doing so, the country reports include relevant case law from their jurisdictions. This input from practice, not surprisingly, suggests that the legal framework may not be decisive for applying jurisdictional rules with regard to corporate accountability for alleged crimes committed along the supply chain, but that active NGOs and their strategic litigation are just as important as the laws.

At the end of the study, draft Recommendations were formulated that the AIDP Colloquium used as a starting point for discussion on the drafting of the Section IV resolutions.

The project benefitted from financial support provided for by the Swiss National Research foundation, the Faculty of Law at the University of Basel as well as the AIDP National Groups. I furthermore wish to thank Sylwia Broniszewska-Emdin for her tenacious support and tremendous commitment as well as Sylvia Meyer and Claudine Abt for their highly valuable assistance.

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<sup>7</sup> See eg Danielle Ireland-Piper, *Accountability in Extraterritoriality. A comparative and International Law Perspective* (Cheltenham Elgar 2017); Richard Barnes and Vassillis Tzevelekos (eds), *Beyond Responsibility to Protect: Generating Change in International Law* (Intersentia 2016); Rose Ireland, 'Rights and modern slavery: the obligations of states and corporations in relation to forced labour in global supply chains' (2017) 6 UCL JL and J 2, 100-129.

<sup>8</sup> Mireille Delmas-Marty, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law' 1 *Journal of International Criminal Justice* (2003) 13, 25; Albin Eser, *Comparative Criminal Law: Development-Aims-Methods*, (Beck 2017) 19 et seq.



**CONFERENCE PROCEEDINGS AND RESULTS OF THE XXTH AIDP-  
IAPL INTERNATIONAL CONGRESS OF PENAL LAW CRIMINAL  
JUSTICE AND CORPORATE BUSINESS**

**SECTION IV: PROSECUTING CORPORATIONS FOR VIOLATIONS OF  
INTERNATIONAL CRIMINAL LAW:  
JURISDICTIONAL ISSUES**

**BASEL, 21-23 JUNE 2017**



# GENERAL REPORT ON PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW: JURISDICTIONAL ISSUES

*By Sabine Gless and Sarah Wood*

## 1 Executive Summary

This report analyses the problems criminal justice systems face in addressing alleged corporate wrongdoing. Corporations, unlike human beings, are established in one state, engage in business in and out of that state, and may have subsidiaries and suppliers in other states. As such, holding them accountable for wrongdoing becomes a complicated transnational issue. A multitude of factors come into play within this topic, including the fact that corporate criminal liability is not yet a generally accepted phenomenon. Liability of corporate groups as entities and accountability for their supply chains as an aggregate are also ambiguous issues that have not been addressed in most criminal justice systems. Further, the applicability of prevailing jurisdictional rules to corporations remains unclear, particularly with respect to new notions of addressing legal persons as modern citizens, for instance when using the active personality principle of jurisdiction.

Focusing on the jurisdictional issues surrounding prosecuting corporations for alleged severe human rights violations and treaty crimes, this report looks first at the general framework for prosecuting corporate crime in different states with regard to substantive and procedural law. It then addresses applicable jurisdictional issues and finally concludes with the resolutions from the June 2017 colloquium of panel 4 preparing the 20<sup>th</sup> AIDP International Congress of Penal Law.

As the UN Guiding Principles on Business and Human Rights of 2011 (hereinafter *UN Guiding Principles*) oblige countries to establish a legal framework ensuring that corporations respect internationally protected legal interests (e.g., environment issues, workers' protection, anti-corruption laws) and basic human rights, it will have consequences for jurisdictional rules. States are obligated to provide a remedy for victims of alleged human rights violations by corporate groups, as well as crimes alleged to have occurred in their supply chains if certain conditions are met. Of particular interest is the establishment of the link between substantive law and the application of territorial jurisdiction. Also addressed is the need for potential enhancement of traditional jurisdictional rules, including the personality principle, to create a more clear and distinct assignment of jurisdiction to minimize the risk of negative conflicts of jurisdiction and provide efficient remedies to victims of alleged human rights abuses.

This general report is based on the country reports from representatives of 14 legal systems: Ivory Radha and Anna John (Australia), Ingeborg Zerbes (Austria), Rodrigo de Souza Costa and Renata da Silva Athayde Barbosa (Brazil), Zhenjie Zhou (China), Dan Helenius (Finland), Juliette Lelieur (France), Martin Böse (Germany), Gabriella Di Paolo (Italy), Cedric

Ryngaert and Emma van Gelder (Netherlands), Gleb Bogush and Vitaly Beloborodov (Russia), Ángeles Gutiérrez Zarza (Spain), Per Hedvall and Ashraf Ahmed (Sweden), Mark Pieth (Switzerland), Sara Sun Beale (USA). In addition, Prof. Kenneth Gallant of the University of Arkansas has submitted a special report focusing in jurisdiction and reparations. The General Reporter is most grateful to the authors for providing excellent national reports (referred to in italicised country names throughout this report), which contain a wealth of information and relevant considerations that are the basis for this report.

## 2 Introduction

Although criminal prosecution of corporations is still a controversial topic, legislation in many states has repudiated the traditional principle of *societas delinquere non potest*.<sup>1</sup> However, many important questions remain unanswered, among them the issue of liability of a corporate group as an entity and for a supply chain as an aggregate.<sup>2</sup> As corporations function on business models founded upon worldwide access to resources like raw materials, labour, and corporate-friendly legal frameworks, they have become important players when it comes to enforcing relevant international standards. As such, the *UN Guiding Principles*<sup>3</sup> recommend that states establish a legal framework to ensure respect and protection of certain human rights along international supply chains. To that end, states shall provide a remedy for alleged victims of corporate crime. These so-called *Ruggie Principles*<sup>4</sup> establish three overarching goals: *protect, respect, and remedy*. Explicit protected rights have not been listed but other legal instruments, including the EU framework and the EU Directive 2014/95/EU,<sup>5</sup> reference specific areas.

The UN Guiding Principles address the fact that multinational corporations have a central role in the global economy today, particularly when states are increasingly sharing governmental responsibilities with private stakeholders, as in the case of the provision of

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<sup>1</sup> See country reports for *Australia, Austria, Brazil, China, Finland, France, Italy, Netherlands, Spain Switzerland* and the *U.S.A* (in the following country reports are referred to by name only). Those states that do not prosecute legal persons include *Germany, Sweden* (see B.I.1a) and *Russia*. For further information see: Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability* (Springer, Dordrecht 2011) 228; José Bertrand Perrin, 'La responsabilité pénale de l'entreprise en droit suisse' in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability* (Springer, Dordrecht 2011) 198; Thomas Weigend, 'Societas delinquere non potest? A German Perspective' (2008) 6 *Journal of International Criminal Justice* (JICJ) 927 et seq.

<sup>2</sup> See Gallant, *Corporate Criminal Responsibility and Human Rights Violations: Jurisdiction and Reparations* (hereinafter: *Jurisdiction and Reparations*); for a detailed discussion see: Katia Villard, *LA compétence du juge Pénal suisse à l'égard de l'infraction reprochée à l'entreprise*. in *International law* (Schulthess, Genève 2017) 333-405.

<sup>3</sup> <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> accessed 29 January 2018.

<sup>4</sup> In reference to John Ruggie, the UN Secretary-General's Special Representative for Business and Human Rights.

<sup>5</sup> EU Directive 2014/95/EU of 22 October 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and group, OJ L 330 of 15.11.2014, 1, [as regards] the environment, ..., implementation of fundamental conventions of the International Labour Organisation, working conditions, ..., health and safety at work, ..., human rights, anti-corruption and bribery, ...

public goods, and in special situations when states' authority is fragile such as in war zones.<sup>6</sup> In order to ensure the respect and protection of certain human rights, authorities need to consider criminal sanctions for corporations to enforce a minimum legal standard. The legitimacy of such a strategy and the requirements for criminal liability in a corporate group or for a supply chain are highly controversial issues. Criminal law is not at the centre of policy debates and corporate executives are quick to point out the potential negative impact of unpredictable criminal liability.<sup>7</sup> Nevertheless, Strategic Litigation Networks (SLNs)<sup>8</sup> have shown that criminal complaints against corporations can be effective tools in shedding light upon the issue.

As it stands today, sustained cross-border corporate criminal prosecution has to address two major issues. First, the problem of broadening corporate criminal liability within criminal justice systems traditionally based upon human acts to include multinational corporate groups and/or supply chains. Second, the possibility of conflicting and overlapping jurisdiction that undermines the legitimacy of potential extraterritorial extension of penal power in the field of corporate crime. The question of how to modify jurisdictional rules for an alleged perpetrator that, unlike a natural person, can split itself into a parent company and numerous subsidiaries (thereby dividing legal responsibility), has not yet been adequately answered. Thus, the efforts of the AIDP to address issues of corporate liability across borders at its 20<sup>th</sup> International Congress of Penal Law are timely.

### **3 General Framework for Prosecuting Corporate Crime**

The question of whether corporations can be prosecuted for crimes allegedly committed within their supply chain depends on various legal factors,<sup>9</sup> most of which fall into the domain of criminal law, and substantive criminal law in particular given that it establishes liability. Additionally, criminal procedural law is relevant in that it shapes potential prosecution and jurisdictional rules. Other applicable legal authorities include corporate law and private international law.

The complexity of such criminal proceedings is multifold. Corporations are designed to pursue economic interests and often have business models based on global access to resources. This may translate into cross-border supply chains or diversification strategies that divide the corporation into subsidiary companies engaging in business in different

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<sup>6</sup> Anne Peters, 'Privatisierung, Globalisierung und die Resistenz des Verfassungsstaates' in Philippe Mastrorandi and Denis Taubert (eds), *Staats- und Verfassungstheorie im Spannungsfeld der Disziplinen*, ARSP Beiheft, Nr 105 (2006) 100 et seq.

<sup>7</sup> See, e.g., Felix Ehrat im Interview mit Peter Fischer und Sergio Aiolfi, 'Die Initiative ist eine Mogelpackung' (NZZ, 8 November 2016) <<https://www.nzz.ch/wirtschaft/wirtschaftspolitik/konzernverantwortungs-initiative-die-initiative-ist-eine-mogelpackung-ld.126981>> accessed 24 November 2017.

<sup>8</sup> E.g. the New York-based Centre for Constitutional Rights (CCR), the European Center for Constitutional and Human Rights (ECCHR) in Berlin, the Human Rights Law Network (HRLN) in New Delhi, or the Southern Africa Litigation Centre (SALC) in Johannesburg.

<sup>9</sup> The crimes relevant for this report cover conduct that is subject to international convention and, specifically, crimes amounting to human rights violations as referred to in the so-called Ruggie report, A/HRC/17/31 of 21 March 2011 <[http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV.pdf](http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf)> accessed 23 February 2018.

jurisdictions. Consequently, the assignment of guilt for wrongdoing is complicated and challenging.

In recent decades the opinion of a 1996 Finnish Bill has become more widespread; that is, 'a corporation in the operations of which an offence has been committed should not be able to escape criminal responsibility simply because the offence has been committed abroad.'<sup>10</sup>

The first question that follows when operationalizing this concept is whether or not criminal justice systems provide for a basis in substantive law to prosecute corporations (legal persons).

International law appears, for the most part, to be mute regarding prosecution of corporate crime.<sup>11</sup> This is not only with regard to substantive law on corporate criminal liability (even for the so-called international core crimes<sup>12</sup>), but also for the procedural framework for such prosecutions, including jurisdictional rules. Increasingly, however, international conventions have begun to require states to have the capacity to investigate, prosecute, and adjudicate alleged wrongdoing of natural persons as well as corporations for certain types of crimes.<sup>13</sup>

Treaty crimes, as opposed to core crimes (e.g., genocide, crimes against humanity, war crimes, and the crime of aggression), refer to serious drug crimes, trafficking crimes, or terrorism as defined in multilateral United Nations treaties or regional conventions. The international significance of the distinction between these two groups of crimes is not entirely clear and it may be that treaty crimes find their way into the jurisdiction of international tribunals or courts in the future.<sup>14</sup> For the purpose of this report, however, treaty crimes include those crimes that are of international significance that occur in national jurisdictions,<sup>15</sup> like environmental crimes, corruption,<sup>16</sup> severe violations of human rights,<sup>17</sup>

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<sup>10</sup> Translation of the explanation provided for the Finnish Government Bill HE 1/1996 vp 24, see *Finland*.

<sup>11</sup> Even though in recent years, an increased number of international treaties and conventions include a general obligation to impose effective, proportionate and dissuasive sanctions on legal persons, they do not specify how to achieve this goal, see c.f. art 10 of the UN Convention Against Transnational Organized Crime (UNTOC) and art 26 of UNCAC.

<sup>12</sup> See *U.S.A.*; Dan Helenius, 'Oikeushenkilön rangaistusvastuu Suomen ulkopuolella tehdyistä rikoksista' (2015) 4 *Defensor Legis* 784; *Ambos* art 25 no. 4, in: Sadat Wexler (ed.), *Model Draft Statute for the International Criminal Court*, (1998); Frank Meyer, 'Multinationale Unternehmen und das Völkerstrafrecht?', 131 *Schweizer Zeitschrift für Strafrecht* (2013), 56 at 68.

<sup>13</sup> See the lists provided for in *Austria, Brazil, China, Italy*.

<sup>14</sup> Roger S Clark, 'Treaty Crimes' in Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge University Press 2016) 214; Neil Boister, 'Treaty Crimes, International Criminal Court?' (2009) 12 *New Criminal Law Review* 341-365.

<sup>15</sup> See Robert Cryer, *Prosecuting International Crimes* (Cambridge University Press, Cambridge 2005) 1; Ilias Bantekas, *International Criminal Law* (4<sup>th</sup> edn, Hart, Oxford 2010) 9.

<sup>16</sup> E.g. United Nations Convention Against Corruption (UNCAC) which requires States Parties to cooperate internationally to implement the Convention.

<sup>17</sup> UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

trafficking in human beings,<sup>18</sup> trafficking in illegal pharmaceutical products,<sup>19</sup> and illegal mining or terrorism.<sup>20</sup> Consequently, domestic criminal justice systems must provide a minimum framework to address alleged wrongdoing by corporations.

The wish to comply with such international laws and standards has led some states to adopt laws targeting corporate criminal conduct.<sup>21</sup> However, given that states are free to address the issue locally, not all have taken the same path. For instance, Germany, Sweden and Russia have no criminal law provision against corporate criminal liability but address the issue by, for example, criminal liability for individuals in the company and corporate fines.

The differences we find in substantive law are mirrored in procedural law and with regard to jurisdictional rules. If a state lacks a provision in its criminal code for criminal liability of corporations, it must establish specific rules governing procedure and legal venue or it runs the risk of impunity simply by the absence of appropriate procedural and jurisdictional rules.<sup>22</sup>

States have approached the new challenge of corporate criminal liability quite differently and some are bound by supranational frameworks, such as the EU member states by European law.<sup>23</sup> As mentioned above, the international community has begun to define treaty crimes so as to commit states to criminalize corporate conduct in certain areas. This development has pushed more states to begin to debate legal frameworks to comply with the spirit of the UN Guiding Principles by protecting certain human rights within corporate business.<sup>24</sup>

### 3.1 Substantive Law Establishing Corporate Criminal Liability

There are roughly two doctrinal models of substantive criminal law that establish liability for a corporation: liability based upon the conduct of the corporation itself<sup>25</sup> and liability based upon actions by an individual employed by the corporation.<sup>26</sup> There are also mixed models of liability addressing overlapping and fluid borders<sup>27</sup> and in some countries there is no statutory base for corporate criminal liability but instead an administrative model.<sup>28</sup>

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<sup>18</sup> See art 4 and 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000.

<sup>19</sup> See, e.g., art 36 of the UN Single Convention on Narcotic Drugs of 1961.

<sup>20</sup> See, e.g., art 4 of the UN Convention for the Suppression of Terrorist Bombings of 1997 and Art 4 and 5 of the UN Convention for the Suppression of the Financing of Terrorism of 1999.

<sup>21</sup> Besides the history of art 102 Swiss CC itself, see, e.g., art 264k Swiss CC; Mark Pieth, *Strafrecht, Besonderer Teil* (Helbing Lichtenhahn, Basel 2014) 259 et seq.

<sup>22</sup> For an illustrative example, see *Germany*.

<sup>23</sup> See, for instance, *Italy*.

<sup>24</sup> See *Australia, Finland, France, Germany, Italy, Netherlands, Spain, Switzerland*.

<sup>25</sup> See, for instance, the allegation of 'lack of a sufficient organization to prevent crimes' and the concept of corporate (Dis)organization in *Switzerland*.

<sup>26</sup> See, for instance, *U.S.A.*

<sup>27</sup> See, for instance, *Australia*.

<sup>28</sup> See, for instance, *Germany* and *Russia*.

In looking at the history of corporate criminal liability and the various state approaches, one is tempted to draw a Civil Law-Common Law divide. While the Anglo-Saxon world introduced corporate criminal liability in the early 20th century,<sup>29</sup> a number of civil law-countries have only reluctantly followed in more recent decades.<sup>30</sup> Others still resist legislation that contradicts the traditional principle of *societas delinquere non potest*, claiming that only human beings (natural persons) can be bound by criminal law.<sup>31</sup> This dispute in principle is not only important for theory, but may also affect enforcement in transnational cases as mutual legal assistance may not be available for cross-border investigations. In actuality, however, it appears that it is not the principles or models themselves that are critical for enforcement, but rather practical issues around implementation, such as limiting criminal liability to enumerated lists of offences,<sup>32</sup> or knowledge about remedies open to alleged victims along a supply chain. Looking at the cases presented in the country reports it appears that the engagement of Non-Governmental Organizations (NGOs) acting within SLNs may be the crucial factor in triggering case law.<sup>33</sup>

### 3.1.1 *Incrimination Based Upon Corporate Acts*

In some states broad laws address corporate liability for an indefinite (or enumerated) number of crimes.<sup>34</sup> Known for its holistic approach to corporate liability is Australia's criminal code.<sup>35</sup> The statutory scheme for such broad criminal liability includes both general references to a failure to act with reasonable care by corporate employees (or agents or officers)<sup>36</sup> to specific acts committed by an organization that endanger society and are the

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<sup>29</sup> Cf John C Coffee, 'Corporate Criminal Liability: An Introduction and Comparative Survey' in Albin Eser, Günter Heine and Barbara Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (Edition Iuscrim, Freiburg 1999) 9; Ved P Nanda, 'Corporate Criminal Liability in the United States: Is a New Approach Warranted?' in Mark Pieth and Radha Ivory (eds) *Corporate Criminal Liability* (Springer, Dordrecht 2011) 7 et seq.; Celia Wells, 'Corporate Criminal Liability in England and Wales: Past, Present and Future' in Mark Pieth and Radha Ivory (eds) *Corporate Criminal Liability* (Springer, Dordrecht 2011) 91.

<sup>30</sup> For instance, *Spain*, and *Switzerland*.

<sup>31</sup> For instance, *Germany* and *Russia*.

<sup>32</sup> See *China* and *Italy*.

<sup>33</sup> See *France*, *Italy*, *Germany*, *U.S.A.*

<sup>34</sup> See *China*, where natural persons may nevertheless have to stand trial in lieu of the corporation, see 'Reply to the question raised by Sichuan Provincial People's Procuratorate' with regard to how to address criminal liability in the case where a suspected corporation is revoked, cancelled or declared bankruptcy, issued on 4 July 2002.

<sup>35</sup> Part 2.5 Federal Australian *Criminal Code* (Cth). For further information, see, e.g., Celia Wells, *Corporate Criminal Responsibility* (2<sup>nd</sup> edn, Oxford University Press 2001) 85, 127; Adán Nieto Martín and Marta Muñoz de Morales, 'Compliance Programs and Criminal Law Responses: A Comparative Analysis' in Stefano Manacorda, Francesco Centonze, and Gabrio Forti (eds), *Preventing Corporate Corruption: The Anti-Bribery Compliance Model* (Springer, Cham 2014) 333, 336; Mark Pieth, 'Emergence and Convergence: Corporate Criminal Liability Principles in Overview' in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer, Dordrecht 2011) 3.

<sup>36</sup> For a critical assessment of this Australian law see OECD-WGB, 'Australia: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions' (2006) para 150, available at <<http://www.oecd.org/austral-lia/australia-oecdanti-briberyconvention.htm>> accessed 8 December 2017.

result of 'a guilty mind'.<sup>37</sup> Although at first blush such laws appear to establish far-reaching liability, they become quite narrow when applied only to specifically enumerated crimes.<sup>38</sup>

### 3.1.2 Attribution of Individual Acts to a Corporation

Several states have responded to the issue of corporate criminal liability by attributing individual action to corporations, provided that a nexus can be established.<sup>39</sup> This includes both common law legal systems such as the U.S., as well as civil law legal systems like Austria,<sup>40</sup> Finland, and Spain.

In the U.S. the 1909 Supreme Court decision in *New York Central & Hudson River Railroad v. United States* established corporate criminal liability for violations of federal law by agents, officers, and employees of a corporation.<sup>41</sup> The *U.S. Country Report* suggests this seminal case is 'a strong endorsement of corporate criminal liability and the respondeat superior test, which is now applied to other federal offences in all federal courts'.<sup>42</sup> Under this test, a corporation is liable for offences committed by its officers, employees, or agents within the scope of their employment so long as the act was at least in part for the benefit of the corporation.<sup>43</sup>

According to Finnish law, a corporation, foundation, or other legal entity in whose operations an offence has been committed may face corporate fines if such a sanction has been provided for in the criminal code.<sup>44</sup> Generally speaking, Finnish law divides the preconditions for corporate criminal liability into two parts: requirements concerning the offence and a sort of communality requirement, both of which are rather narrow.<sup>45</sup> For

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<sup>37</sup> See art 30 of China's 1997 Criminal Law, which sets the general requirement for prosecution of specifically listed corporate crimes.

<sup>38</sup> For example, *China*, where it has been possible to prosecute corporate crimes since 1998, but only crimes that are earmarked as corporate crimes; others such as so-called 'international crimes' (or rather the core crimes) for which only natural persons can be prosecuted, are not included. For more examples of models with listed crimes, see *Austria*, *Spain*, or art 102 para 2 of the Swiss Criminal Code.

<sup>39</sup> *Austria*; *Finland*, or *Brazil*: STJ 6<sup>a</sup> Turma RMS 39.173-BA, Rel Min Reynaldo Soares da Fonseca, julgado em 6/8/2015 (Info 566). STF 1<sup>a</sup> Turma RE 548181/PR, Rel Min Rosa Weber, julgado em 6/8/2013 (Info 714).

<sup>40</sup> *Austria* has a special position with adopting the 'Verbandsverantwortlichkeitsgesetz' VbVG 'Act on Corporate Criminal Liability', BGBl I 2005/151 in 2005. For further information see Peter Lewisch, 'Verbandsverantwortlichkeit' in Studiengesellschaft für Wirtschaft und Recht (ed), *Wirtschaftsstrafrecht* (Linde, Wien 2008) 207; Reinhard Moos, 'Die Strafbarkeit juristischer Personen und der Schuldgrundsatz' (2004) 5 *Österreichische Richterzeitung* (RZ) 98.

<sup>41</sup> *New York Central & Hudson River Railroad v United States*, 212 US 481 (1909). For a description of the case, see Sara Sun Beale, 'The Development and Evolution of the US Law of Corporate Criminal Liability and the Yates Memo' (2016) 46 *Stetson L Rev* 41, 43-49.

<sup>42</sup> Sara Sun Beale, 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo' (2016) 46 *Stetson L Rev* 41, 43-49. at 49.

<sup>43</sup> See generally, Sarah N Welling et al, *Federal Criminal Law and Related Actions: Crimes, Forfeiture, the False Claims Act and RICO* (St Paul, Minn: West Group 1998) §§ 5.3-5.5. See *United States v Singh*, 518 F3d 236, 250 (4<sup>th</sup> Cir 2008); *United States v Jorgensen*, 144 F3d 550, 560 (8<sup>th</sup> Cir 1998) *United States v Sun-Diamond Growers of Cal*, 138 F3d 961, 970 (DC Cir 1998).

<sup>44</sup> C 9, s 1, para 1 of the Finnish Criminal Code (39/1889).

<sup>45</sup> See in detail Jussi Matikkala, *Rikosoikeudellinen seuraamusjärjestelmä* (Edita Publishing, Helsinki 2010) 182-188.

example, it is not sufficient that an offence has been committed during normal business operations, it must also be proven that the corporation has acted reprehensibly in its operation and that these actions are connected to the commission of the offence.<sup>46</sup>

According to *Spain*, a corporation can be prosecuted for criminal offences committed by directors on behalf of the corporation, as well as those committed by employees so long as they can be attributed to the corporation as a result of inadequate employee control. Adequate control of employees includes a detailed description of an appropriate compliance management system but limits corporate criminal responsibility to cases foreseen in the Criminal Code. Such cases are mainly related to white-collar crime<sup>47</sup> and enumerated violations of human rights.<sup>48</sup> By contrast, Sweden approaches the issue by limiting criminal liability to acts committed by individuals in executive positions such as board members, managing director or another person who otherwise had a special responsibility for supervision or control in the business.<sup>49</sup>

### 3.1.3 Mixed Models

Other states have mixed models of establishing corporate liability. Some authorize criminal prosecution only if an individual's wrongdoing is combined with corporate action, like in *Italy*,<sup>50</sup> where an individual connected to the corporation in a qualified relationship violates the law and an aspect of corporate blame (*colpa d'organizzazione*) can be proven. Similarly, in the *Netherlands*, a corporation may be considered a perpetrator if illegal conduct is committed by one or more employees while negligence can be imputed directly to the corporation.<sup>51</sup>

Other legal systems create separate liability for corporate acts as well as individual wrongdoing.<sup>52</sup> For example, Swiss law provides for criminal liability for 'deficiencies in

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<sup>46</sup> Dan Helenius, 'Oikeushenkilön rangaistusvastuu Suomen ulkopuolella tehdyistä rikoksista' (2015) 4 *Defensor Legis* 772–790, 776.

<sup>47</sup> Unauthorised disclosure of information (*descubrimiento y revelación de secretos*), art 197 quinques CP; Fraud (*estafa*), art 251bis CP; Frustrated execution of crime, art 258ter CP; Insolvency crime, art 261bis CP; Cybercrime, art 264quater CP; Crimes related to intellectual and industrial property, markets and consumers, art 288 (2) CP; Money laundering, art 302 (2) CP; Illegal financing of political parties, art 304bis (5) CP; Crimes against Public funds and Social Security, art 310bis CP etc.

<sup>48</sup> Gathering, trafficking and illegal reception of human organs, art 156bis (3) CP; Trafficking in human beings, art 177bis (7) CP; Exploitation of prostitution and other forms of sexual exploitation, and abuse of minors, art 189bis CP; Criminal offences against the rights of foreign citizens, including illegal immigration, art 318bis (5) paras (1) and (2) CP; Criminal offences against natural resources and environment, art 328 CP; Crimes related to nuclear materials and other hazardous radioactive substances, art 343(3) CP; Crimes against public health, art 366 CP; Drug trafficking, art 369bis, paras (3) to (6) CP; Crimes related to hate speech, discrimination and violence, art 510bis; Terrorism financing, art 576 (5) CP.

<sup>49</sup> See Swedish Penal Code Section 36 Paragraph 7.

<sup>50</sup> See *Italy* and the 2001 *a responsabilità amministrativa*; see art 2 of Legislative Decree 8 June 2001, no. 231.

<sup>51</sup> François GH Kristen, 'Maatschappelijk verantwoord ondernemen en strafrecht' in AJ Eijlsbouts and JM de Jongh (eds), *Maatschappelijk verantwoord ondernemen* (Handelingen Nederlandse Juristenvereniging, Kluwer 2010) 133.

<sup>52</sup> See art 31bis *Spanish Criminal Code* (as amended by Qualified Law 7/2012, of 27 December [BOE n 312, 28 December 2012] and by the Qualified Law 1/2015 of 30 March [BOE n 77, 31 March 2015]).

organization<sup>53</sup> related to an individual or individuals impeding law enforcement from locating the responsible party. Liability may also stem from flaws in the way the corporation was organized if it failed to prevent any one of an enumerated list of offences.<sup>54</sup> However, liability is limited by a tripartite formula that favours corporations.<sup>55</sup> Specifically, the offence must be committed a) within an enterprise, b) in the course of its business activities, and c) within the framework of the 'corporate goal'. The formula is intended to exclude corporate liability for the private activities of its employees. It is presently unclear whether the 'within an enterprise' requirement has the effect of excluding responsibility in a holding structure and it is nearly always the case that natural persons can be charged in addition to a corporation.<sup>56</sup>

#### 3.1.4 No Corporate Criminal Liability

Some states retain the Roman Law principle of *societas delinquere non potest* in their criminal law doctrine, but still allow for administrative proceedings against corporations that provide a form of punishment.<sup>57</sup> Included in this list of states that follow the dogma that only natural persons can wilfully act and thus be guilty of wrongdoing are Germany, Sweden and Russia.

The *German Country Report* highlights the notion that a corporation or legal person faces only the possibility of fines for wrongdoing and such a fine may be imposed only if an organ, representative, or individual with some aspect of corporate control has committed a criminal or a regulatory offence. The liability of the corporation is primarily based upon the criminal conduct of executive officers and legal representatives,<sup>58</sup> but there is also the possibility of imposition of fines when an ordinary employee commits an offence on behalf of the legal person and a representative of the corporation had failed to prevent or discourage the commission of the offence through proper supervision.<sup>59</sup> As a consequence, a lack of organization and supervision are considered to be core components in legitimizing sanctions.<sup>60</sup> However, establishing responsibility is still contingent upon a) the perpetrator-representative breaching one or more of the corporation's legal obligations or b) the

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<sup>53</sup> Mark Pieth, 'Die Strafrechtliche Verantwortung des Unternehmens' (2003) 121 *Schweizerische Zeitschrift für Strafrecht* 363 et seq; Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability* (Springer, Dordrecht 2011) 33 et seq.

<sup>54</sup> The list includes money laundering, financing of terrorism, and corruption.

<sup>55</sup> Marc Jean-Richard-dit-Bressel, *Das Desorganisationsdelikt*, art 102 Abs. 2 StGB im Internationalen Kontext (Dike, Zürich 2013) 237 et seq.

<sup>56</sup> *China* (based on the *Interpretation of Article 30 of the Criminal Law of PRC* issued by the Standing Committee of the National People's Congress. Culpable individuals, referred to as 'the persons who are directly in charge of or the other persons who are directly responsible for the crime in question' in article 31 of the 1997 *Criminal Law*, are punished under either 'dual punishment' or 'single punishment' principles).

<sup>57</sup> See Germany and Russia.

<sup>58</sup> Klaus Rogall, *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten: OWiG* (4<sup>th</sup> edn, CH Beck, München 2014) § 30 para 8; Klaus Tiedemann, *Wirtschaftsstrafrecht – Einführung und Allgemeiner Teil* (4<sup>th</sup> edn, CH Beck, München 2014) para 375.

<sup>59</sup> See Germany.

<sup>60</sup> Klaus Tiedemann, 'Die Bebußung von Unternehmen nach dem 2. Gesetz zur Bekämpfung der Wirtschaftskriminalität' (1988) 41 *Neue Juristische Wochenschrift* 1169, 1172-1173.

corporation being enriched (or should have been enriched) by the offence.<sup>61</sup> Notably, in 2013 the German state *Nordrhein-Westfalen* proposed a code to establish corporate criminal liability (*Verbandsstrafgesetzbuch*).<sup>62</sup>

The Swedish Penal Code focuses on the entrepreneur if crimes are committed in the exercise of business activities.<sup>63</sup> Several legislative reform projects aiming to introduce corporate criminal liability in Russia have not been successful as many Russian courts and legal scholars adhere to the belief that liability based on administrative offences is adequate.<sup>64</sup> According to *Brazil*, no specific rules for criminal liability appear in the state's penal code, but two constitutional articles exist that imply corporations can engage in criminal activity, albeit primarily financial or environmental.<sup>65</sup>

### 3.2 Procedural Law Governing Prosecution of Corporate Crime

The procedural framework states provide for the prosecution of corporations depends first upon the establishment (and codification) of corporate criminal liability. If a state does not authorize corporate criminal liability, but instead ensures accountability based upon administrative fines, such as Germany, prosecutorial authorities may have more discretion in charging. For instance, in Germany the principle of mandatory prosecution applies to criminal, but not administrative (civil), cases.

States that prosecute corporations typically have implemented some aspect of procedural law adapting the criminal trial to the specific characteristics of legal persons, although they vary in regulatory density. Some states have adopted a specific body of rules, like the Netherlands, where rules for prosecuting a corporation are laid down in a special part of the Dutch Code of Criminal Procedure.<sup>66</sup> Other states do not provide particular procedural rules and apply traditional criminal procedures, occasionally modified to create procedural rights for corporations on trial.<sup>67</sup>

That said, most states appear able to foresee the need for specific procedural rules to facilitate the prosecution against a corporation, for instance, by demanding that a natural

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<sup>61</sup> § 30(1) ROA.

<sup>62</sup> <[https://www.justiz.nrw.de/JM/leitung/jumiko/beschluesse/2013/herbstkonferenz13/zw3/TOP\\_II\\_5\\_Gesetzentwurf.pdf](https://www.justiz.nrw.de/JM/leitung/jumiko/beschluesse/2013/herbstkonferenz13/zw3/TOP_II_5_Gesetzentwurf.pdf)> accessed 30 August 2016.

<sup>63</sup> See Swedish Penal Code, Chapter 36, Section 7.

<sup>64</sup> See *Russia*.

<sup>65</sup> 'Corporations will be held responsible administratively, civil and criminally in cases where the crime is committed by its legal or contractual manager, or by its organs, on the interest or benefit of the entity.' art 3, l n 9605/98; Article 173 (...) Paragraph 5. 'The law shall, without prejudice to the individual liability of the managing officers of a legal entity, establish the liability of the latter, subjecting it to punishments compatible with its nature, for acts performed against the economic and financial order and against the citizens' monies.' Article 225, (...) Paragraph 3. 'Procedures and activities considered as harmful to the environment shall subject the offenders, be they individuals or legal entities, to penal and administrative sanctions, without prejudice to the obligation to repair the damages caused.' Available at: <<http://english.tse.jus.br/arquivos/federal-constitution>> accessed 9 September 2016.

<sup>66</sup> Title 4, articles 528-532, see *Netherlands*.

<sup>67</sup> In *Austria*, for instance, the Procedural Code (StPO) is applied subject to a limit for rules 'which are explicitly meant for natural persons'.

person is assigned as a representative.<sup>68</sup> Others have gone as far as France, where a court officer may be appointed to represent a corporation if needed. Some states require that the corporation be prosecuted simultaneously with the individual alleged to have committed the predicate crime.<sup>69</sup> This approach may sort out problems of granting privileges for co-defendants, one of them being that a legal person that cannot speak for itself.<sup>70</sup>

In some states, such as the *Netherlands*, authorities have attempted to house certain proceedings involving cross-border corporate investigations within a specialized or centralized body which is given sole jurisdiction to hear the cases.<sup>71</sup> The *Netherlands*, as well as several other states, allow proceedings against corporations to be conducted in absentia.<sup>72</sup> This includes states where corporations face no criminal liability (e.g., *Germany*), as well as those where criminal charges may be brought (e.g., *Australia* and *Austria*).<sup>73</sup>

In the U.S., specific provisions of the U.S. Attorneys' Manual (*USAM*) govern the prosecution of corporations and other legal entities.<sup>74</sup> Although the doctrine of *respondeat superior* does not require proof that a corporation was at fault in employing or supervising its agents or employees, the *USAM* clearly indicates that criminal charges shall not be brought solely on the basis of the doctrine and prosecutors are to consider a variety of factors in determining whether or not to pursue charges.<sup>75</sup> Such factors include the pervasiveness of the wrongdoing within the corporation, the corporation's history of misconduct, the impact of any compliance programs, the timeliness and voluntariness of a corporation's disclosure of wrongdoing, and whether the corporation cooperated, obstructed the process, or paid restitution.<sup>76</sup>

By contrast, there are still jurisdictions that do not seem to have any special rules for prosecuting legal persons despite theoretically being authorized to do so.<sup>77</sup>

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<sup>68</sup> Like in *Spain* (*Ley de Enjuiciamiento Criminal*, stipulating, for instance, the obligation of corporations to designate a lawyer (art 119(a)), the rules of the hearing before the investigating judge (art 119(b)) and the right of information (art 119(1)(c)) or in *Switzerland* with its rules governing the representation of corporations in criminal proceedings (art 112 CCP) ensuring that an individual act as a representative. See also *China, Brazil, Germany, Sweden*.

<sup>69</sup> See, for instance, *China*.

<sup>70</sup> See *Australia, Netherlands, Spain, Switzerland, U.S.A.*

<sup>71</sup> See *Aanwijzing afdoening aangiften mbt de strafbaarstellingen in de Wet Internationale Misdrijven, Stcr 2011, no 22803, 1; 'Internationale Misdrijven', Openbaar Ministerie*, retrieved from: <<https://www.om.nl/onderwerpen/internationale/>> accessed 31 May 2016.

<sup>72</sup> *Austria, Germany, Italy, Spain, U.S.A.* In the *Netherlands*, no defendant, natural or legal, is required to appear at trial. On the basis of article 279(1) DCCP, (s)he can be represented at trial by a lawyer if the latter is expressly authorized to do so. If the lawyer is not authorized on the basis of article 279 DCCP, the trial is 'in absentia'.

<sup>73</sup> *Criminal Procedure Act 2004 (WA)*, No 071 of 2004, s 88(6), Div 6; *Criminal Procedure Act 2009 (Vic)*, No 7 of 2009, ss 82, 154, 214.

<sup>74</sup> See *USAM*, supra, § 9-28.000 ('Principles of Federal Prosecution of Business Organizations').

<sup>75</sup> Sara Sun Beale, 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo' (2016) 46 *Stetson L Rev* 41, 43-49 at 50-51.

<sup>76</sup> *USAM*, § 9-28.300.

<sup>77</sup> See *Brazil, China*.

## 4 Jurisdictional Issues

The potential extension of corporate criminal liability along supply chains and across borders raises manifold jurisdictional issues, some of which are determined by substantive law. Traditionally, criminal codes link the exercise of jurisdiction to acts within the state (territoriality) or harm of persons. However, incrimination of a corporation can be based upon corporate behaviour, acts by a corporate agent, or some combination of both, each of which may trigger different jurisdictional rules.<sup>78</sup> Therefore, it would seem prudent for states to adopt specific legislation that clearly defines what triggers jurisdiction over corporate conduct. Those states that refrain from pursuing corporate criminal liability run the risk of not having an appropriate set of jurisdictional rules given that criminal codes do not apply when determining jurisdictional issues. Whether alleged corporate crime can be investigated and prosecuted is only the first layer in a web of jurisdictional principles.

### 4.1 Defining Jurisdiction

Jurisdiction is traditionally divided into three categories: jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce.<sup>79</sup> In this report, the term ‘jurisdiction’ refers to prescriptive jurisdiction which, in the realm of criminal law, is essentially identical to adjudicative jurisdiction.<sup>80</sup> Jurisdiction to prescribe denotes a state’s competence to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court.<sup>81</sup> It thus defines the geographical scope of domestic law.<sup>82</sup>

Not all states explicitly distinguish between prescriptive jurisdiction and adjudicative jurisdiction, which grants a state authority to subject persons to its courts.<sup>83</sup> Prescriptive jurisdiction is sometimes also referred to as legislative competence and adjudicative jurisdiction as judicial competence.<sup>84</sup> This is generally not an issue so long as prescriptive jurisdiction coincides with adjudicative jurisdiction (e.g., when a states exercises *ius*

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<sup>78</sup> See *Germany*.

<sup>79</sup> See Kenneth Gallant, *Corporate Criminal Responsibility and Human Rights Violations: Jurisdiction and Reparations* (hereinafter: *Jurisdiction and Reparations*).

<sup>80</sup> Kenneth Gallant, ‘Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts’ (2003) 48 *Villanova Law Review* 763.

<sup>81</sup> Restatement of the Law, Third, 1987 (Foreign Relations Law of the United States), § 401(a).

<sup>82</sup> Cedric Ryngaert, *Jurisdiction in International law* (OUP, Oxford 2008) 9.

<sup>83</sup> See, for instance, *Austria, Brazil or Sweden*.

<sup>84</sup> See, for further explanations, Anna Petrig, ‘The expansion of Swiss criminal jurisdiction in light of international law’ (2013) 9 *Utrecht Law Review* 34-55, 34.

*puniendi*, thereby implying the application of its domestic criminal law).<sup>85</sup> Other states retain the distinction for cases where their authorities exercise derivative or vicarious jurisdiction.<sup>86</sup>

In many states, and certainly in civil law systems, criminal codes prescribe a set of rules governing the scope of application of domestic laws.<sup>87</sup> Other countries address specific situations with separate rules.<sup>88</sup>

#### 4.2 Scope of Jurisdiction

When defining the scope of jurisdiction for any given law, a clear divide between civil and common law systems emerges.

In continental European criminal justice systems, the scope of jurisdiction is generally defined by lawmakers. For example, in 2014 when the Dutch Government changed the legal framework concerning jurisdiction,<sup>89</sup> it explained the change citing three rationales: (1) to strengthen the protective function of the DPC; (2) to remove the distinction between jurisdiction over persons with Dutch nationality and foreigners residing on Dutch territory; and (3) to make the rules on jurisdiction more accessible.<sup>90</sup>

The situation in common law states is significantly more complex due to the influence of multiple systems, including a legislative body that creates separate civil and criminal codes to be enforced by multi-tier judicial systems. As we see in *Australia* or *U.S.*, there are different legislative acts that affect the federal and state criminal justice and civil law systems. In the U.S., the scope of jurisdiction over transnational crime depends upon both Congressional Acts and the federal courts' interpretation of those acts, which may or may not result in the conferral of extraterritorial jurisdiction. Over the last fifteen years, the U.S. Supreme Court has narrowed its interpretation of general jurisdiction in civil cases based upon extraterritorial conduct, citing the need to avoid international discord.<sup>91</sup> This has resulted in the lower federal courts applying a strong presumption against extraterritorial jurisdiction, which was recently reaffirmed by the Supreme Court in 2016.<sup>92</sup>

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<sup>85</sup> See *Spain* with reference to María Teresa Comellas Aguiñezàbal, 'La jurisdicción universal en España tras la reforma de 2009: racionalización del principio o un paso atrás en la lucha contra la impunidad?' (2010) *Anuario Español de Derecho Internacional*, vol 26, 69 (in text and footnote n 25); for illustrative examples *Finland* with reference to Chapter 1 of the *Criminal Code*.

<sup>86</sup> Martin Böse, in Urs Kindhäuser, Ulfrid Neumann and Hans-Ulrich Paeffgen (eds), *NK-Strafgesetzbuch* (4<sup>th</sup> edn, Nomos, Baden-Baden 2013) Vor § 3 para 9-11; Frank Meyer, 'Country Report 'Criminal Jurisdiction in Germany' in Martin Böse, Frank Meyer and Anne Schneider, *Conflicts of Jurisdiction, Vol. I. National Reports and Comparative Analysis* (Nomos, Baden-Baden 2013) 141, 169. See § 7(2) No 2 German CC.

<sup>87</sup> Dan Helenius, *Straffrättslig jurisdiktion* (Suomalainen Lakimiesyhdistys 2014) 152–153.

<sup>88</sup> Like *Switzerland*, e.g. in art 264m Swiss CC.

<sup>89</sup> See the Dutch Act on Review of the Rules concerning Extraterritorial Jurisdiction in Criminal Cases.

<sup>90</sup> Richard van Elst, 'Tekst and Commentaar Strafrecht, commentaar op artikel 2 - 8' in Tineke Cleiren, Jan Crijns and Tino Verpalen (eds), *Tekst & Commentaar Strafrecht*, (Wolters Kluwer, Den Haag 2014).

<sup>91</sup> *Daimler AG v Bauman*, 134 S Ct 746, 760 (2014).

<sup>92</sup> *RJR Nabisco v European Community*, 136 US 29 (2016). Earlier cases had recognized this presumption, but courts more frequently found that legislation applied extraterritorially. See *U.S.A.* with reference to RESTATEMENT (FOURTH), Tent Draft No 2, § 203, Reporters' Note 1 (describing the evolution of the presumption) [hereinafter RESTATEMENT (FOURTH) Tent Draft No 2].

### 4.3 Territoriality – The Rule with Exceptions

All states acknowledge the principle of territoriality as the primary means of asserting jurisdiction. That is, a state can prosecute criminal offences that have been allegedly committed within its borders.<sup>93</sup> As is well known from domestic law, where a crime is determined to have happened is not only a geographical question but also a legal one.<sup>94</sup> Many states use a broad concept of territorial jurisdiction whereby not all components of the crime need to have taken place inside the state's territorial borders, only a part of an offence need be committed on domestic grounds.<sup>95</sup> In Switzerland, if the crime produces a negative effect on the land, a sufficient basis for jurisdiction is created.<sup>96</sup> According to *Italy*, if the act involves an organised group operating outside the state but includes people taking part within Italian borders, the state may assert jurisdiction.<sup>97</sup> *Australia* also apparently allows for the exercise of jurisdiction where a crime (or part of a crime) occurred within its territory, but also for crimes committed outside the state if there is a negative effect upon Australia.<sup>98</sup>

Despite the understanding that territoriality is the rule and extraterritorial jurisdiction the exception, most states extend their 'legal soil' via expansive definitions of territoriality or acknowledge multiple jurisdictional possibilities when a crime is allegedly committed in another state.<sup>99</sup> Long lists of crimes covered by domestic jurisdiction exist in states that appear to support a broad criminal justice approach to conduct committed abroad.<sup>100</sup> However, such wide-range approaches are often subject to the requirement of double criminality.<sup>101</sup>

### 4.4 Personality Principles

Common accessory or secondary means of asserting jurisdiction are the active (a state's national is the perpetrator of a crime) and passive (a state's national is the victim of a crime) personality principles.<sup>102</sup> As a rule, most states acknowledge the active personality principle with regard to their own citizens, but are considerably more cautious in using the passive

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<sup>93</sup> See, for instance, *Australia, Austria, Brazil, China, Germany, Netherlands, Sweden, USA*.

<sup>94</sup> For detailed explanations about the normative construction of territoriality see *Netherlands*.

<sup>95</sup> See, for instance, *Germany, Sweden, Switzerland* or illustrated with case law from the *Netherlands*: judgments of the Hoge Raad: HR 14 September 1981, ECLI:NL:1981:AC3699, ro 4; HR 2 February 2010, ECLI:NL:HR:2010:BK6328, ro 2.4. See also *Austria*: OGH: 12 Os 111/06z; 12 Os 120/91; 10 Os 16/69; EvBl 1969/245; 13 Os 29/72, JBl 1972, 623; Verena Murschetz, *Auslieferung und Europäischer Haftbefehl* (Springer, Wien 2007) 46.

<sup>96</sup> Sabine Gless, *Internationales Strafrecht, Grundriss für Studium und Praxis* (2<sup>nd</sup> edn, Helbing Lichtenhahn, Basel 2015) 153-155.

<sup>97</sup> See *Italy*.

<sup>98</sup> See *Australia*.

<sup>99</sup> See, for instance, *France, Sweden*.

<sup>100</sup> See *Germany, Austria, Australia, Switzerland; Brazil, France*. For further information, see Frank Meyer, Country Report 'Criminal Jurisdiction in Germany' in Martin Böse, Frank Meyer and Anne Schneider (eds), *Conflicts of Jurisdiction, Vol. I. National Reports and Comparative Analysis* (Nomos, Baden-Baden 2013) 141 et seq.

<sup>101</sup> See, for instance, *Austria, Australia, Brazil, France, Germany, Sweden, Switzerland*.

<sup>102</sup> See, for instance, *Brazil, Australia, Austria, Germany, Switzerland, USA*.

personality principle. As a result, the active personality principle is exercised broadly<sup>103</sup> while the passive personality principle is used less frequently, although in some states it may be extended to aliens with permanent residence.<sup>104</sup> The traditional rationale underpinning the use of personality principals of jurisdiction has primarily been to avoid negative conflicts of jurisdiction and to protect a state's citizens and residents from extradition and prosecution in a foreign country.<sup>105</sup> But in certain states other motivations apparently substantiate recourse to the active nationality today: the presence of an accused. To avoid situations where an individual is compelled to answer to the law of different states with contradicting norms, most states subject the personality principle to the requirement of double criminality.<sup>106</sup> Therefore, in such these states unrestricted territoriality may be the best option. Such is the case, in particular, when substantive law offers a broad array of ways to apply territorial jurisdiction.<sup>107</sup> For example, obligating a parent company to control its subsidiaries with the threat of potential criminal liability in case of a lack of supervision. However, this is not the case in all jurisdictions,<sup>108</sup> so use of the personality principle may be a valid choice where territoriality is difficult to apply and/or the active personality principle is not restricted by dual criminality.<sup>109</sup>

Notably, avoiding negative conflicts of jurisdiction by providing a remedy is one of the main tenants of the *UN Guiding Principles*. Including corporations in the scope of jurisdiction based on personality principles as they apply domestically could be a solution for unwanted impunity of corporate conduct abroad.

Nevertheless, the basis for citizenship within the active personality principle becomes a complicated legal question with regard to corporations: can a legal entity be treated as a citizen given that it is not born or naturalized into a community? And if so, when and where would this be? In its state of residence or place of incorporation? Such questions are not yet widely discussed across states as some do not endorse the idea of a legal person stepping into the shoes of a natural person.<sup>110</sup> That said, the country reports show that there are a variety of ways a state can treat corporations as natural persons, including using a broad legal definition of 'person' in jurisdictional rules,<sup>111</sup> subscribing to the idea of registration giving rise to status as a person,<sup>112</sup> and using a corporation's habitual residence or primary

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<sup>103</sup> See U.S.A. with reference to *US RESTATEMENT (FOURTH)*, Tent Draft No 2, § 201(d) and *Blackmer v United States* 284 US 421, 436 (1932), the Court stated that '[b]y virtue of his citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country.'

<sup>104</sup> See *Netherlands* with reference to art 5 of the Dutch Penal Code that, however, limits passive personality jurisdiction to crimes that are punishable by at least eight years in prison and subject to dual criminality.

<sup>105</sup> Sabine Gless, *Internationales Strafrecht, Grundriss für Studium und Praxis* (2<sup>nd</sup> edn, Helbing Lichtenhahn, Basel 2015) 142.

<sup>106</sup> See *Germany, Brazil, Switzerland*, and, with certain exceptions, *Austria, Finland, France, Netherlands, Spain, Sweden*.

<sup>107</sup> Like in *Switzerland*.

<sup>108</sup> Especially where corporate accountability is not based on criminal provisions, like in *Germany*.

<sup>109</sup> Like in *Australia, Italy, Russia*.

<sup>110</sup> See, for instance, *Germany, Finland, Sweden, Russia*.

<sup>111</sup> Like in *Australia, Netherlands, U.S.A.*

<sup>112</sup> Like in the *Netherlands*.

place of business to create a *domicile principle*<sup>113</sup> creating citizenship akin to that of natural persons.<sup>114</sup>

Up to this point most jurisdictions that are open to the idea of a corporate citizenship appear to have handled the issue on a case by case basis that fails to consider future problems.<sup>115</sup> In other jurisdictions, particularly where the criminal prosecution of legal persons is still a controversial issue, the application of the active personality principle seems to meet resistance in that it evokes the impression that corporations and humans are not that dissimilar.<sup>116</sup> Other jurisdictions evade the issue entirely by applying the active personality principle to the human agent within the corporation whose conduct triggers liability.<sup>117</sup> While some may argue that expanding the active personality principle to corporations will result in an opening of *Pandora's box*, the country reports received for this study do not indicate significant problems in the states that have endorsed the concept.

In several states also the passive personality principle extends to corporations because the term 'person' has always included both natural and legal persons.<sup>118</sup> The passive personality principle however has particular relevance to jurisdictional issues of corporate crimes in its potential ability to provide a remedy for individual victims of alleged corporate abuse in their home state, even if the purported wrongdoer is residing in another. While the issue of corporations as victims of crimes is not at the core of this project, as all states are aware of the use of the passive personality principle to protect individual victims, the passive personality principle of jurisdiction could also be used to pursue a remedy in that situation.<sup>119</sup> In turn, states whose nationals or residents have been harmed by corporate human rights abuses can create a remedy by asserting passive personality jurisdiction. Ideally, they would be required to do so if a victim would otherwise be without an effective remedy, as in the case of inaction by a state with territorial jurisdiction.

Use of the personality principles of jurisdiction to address the requirement of available remedies in the *UN Guiding Principles* is an interesting idea. However, expanding and developing the use of these principles will obviously not solve all the problems associated with asserting international jurisdiction over corporations. A primary (and important) limitation to the use of personality principles of jurisdiction is the double criminality requirement, which makes the exercise of jurisdiction based upon territoriality the first choice, particularly where a state's substantive law conveys broad legal authority along a supply chain. It may be that use of the personality principles of jurisdiction may create new limitations related to key differences between legal and natural persons. Related to the

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<sup>113</sup> Like in *Austria*.

<sup>114</sup> See, for instance, *Australia, Austria, Brazil, France, Netherlands, Spain; Switzerland, U.S.A.* This does however neither mean that states make use of such jurisdictions (see, for instance, *Brazil, Spain*) nor does it preclude states from using a more efficient jurisdiction, like a broadly defined territoriality principle as it is apparently the case in *France* or *Switzerland*.

<sup>115</sup> See, for instance, *France, Netherlands*.

<sup>116</sup> See, for instance, *Germany*.

<sup>117</sup> Like, for instance, *Italy, Sweden*.

<sup>118</sup> Like in the *Netherlands*.

<sup>119</sup> See, for instance, *Russia, Finland, France, Netherlands, U.S.A.*

personality principle is the issue of subsidiaries: how does the separation of a corporation in two new entities affect jurisdiction? Furthermore, the fact that corporations are not biological entities and are, instead, organized based upon profit earning, may impact the assignment of citizenship.<sup>120</sup>

#### 4.5 Universal Jurisdiction

Universal jurisdiction, or the provision of jurisdiction for any state to adjudicate international crimes, is a controversial form of jurisdiction that apparently has not played a prominent role in prosecuting corporations for alleged violations of human rights. However, there are a number of international conventions that support the use of universal jurisdiction as a means of creating international solidarity in the protection of certain rights or legal interests.<sup>121</sup> Additionally, many European states have taken legislative action to demonstrate their compliance with these international obligations.<sup>122</sup> Other civil law states have addressed the 'best safeguard' ambition for internationally protected interests with a general clause jurisdiction,<sup>123</sup> listing the criminal offences committed abroad for which the state is obligated to prosecute under international law.<sup>124</sup> There has also been movement to narrow universal jurisdiction. Spain, a state with a previously broad interpretation of universal jurisdiction, has recently restricted the scope of its domestic universality principle, redrafting the list of offences and requiring a link with Spain to justify an investigation.<sup>125</sup> Additionally, several civil law states have established minimum thresholds, such as requiring the defendant be present within the state's territory,<sup>126</sup> to prevent overzealous exercise of universal jurisdiction. In most domestic frameworks, specific requirements for corporate defendants have not been created. Ideas of requiring corporate possession of

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<sup>120</sup> Within the European Union, for instance, the principle of freedom of movement prohibits any restrictions on nationals of one Member State to establish themselves in the territory of another Member State. Restrictions referred to in art 49 TFEU include criminal law provisions that in fact infringes on free movement Anne Schneider, 'Der transnationale Geltungsbereich des deutschen Verbandsstrafrechts – de lege lata und de lege ferenda', ZIS 2013, 488 at 494 <[http://www.zis-online.com/dat/artikel/2013\\_12\\_784.pdf](http://www.zis-online.com/dat/artikel/2013_12_784.pdf)> accessed 23 February 2018.

<sup>121</sup> See, e.g., UN Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 (A/RES/3/260); UN Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (A/RES/47/39); UN International Covenant of Economic, Social and Cultural Rights, 16 December 1966 (A/RES/21/2200); UN Convention on the Elimination of All Form of Discrimination against Women, 18 December 1979 (A/RES/34/180); UN Convention on the Rights of the Child, 20 November 1989 (A/RES/44/25); UN Convention for the Suppression of Terrorist Bombings, 15 December 1997 (A/RES/52/164); UN International Convention for the Suppression of the Financing of Terrorism, 9 December 1999 (A/RES/54/109).

<sup>122</sup> *Austria, Switzerland*. See for an illustrative example *Netherlands* in its law reform of 2014, for details see 'Act of Amendment, Review Extraterritorial Jurisdiction' (*Wijzigingswet, Herziening extraterritoriale rechtsmacht*), 1 July 2014, Staatsblad 2013, 484; '*Besluit internationale verplichtingen extraterritoriale rechtsmacht*', retrieved from: <<http://wetten.overheid.nl/BWBR0034775/2016-01-01>> accessed 31 May 2016.

<sup>123</sup> Switzerland.

<sup>124</sup> For instance: *Austria* in § 64 para 1 no 6 Penal Code. See also Farsam Salimi in *Wiener Kommentar zum Strafgesetzbuch StGB* (2<sup>nd</sup> edn, Manz, Wien 2017) § 67 No 85.

<sup>125</sup> Qualified Law 1/2014, of 13 March, amending Organic Law 6/1985 of 1 July of the Judiciary, related to universal jurisdiction. BOE n 63, 14 March 2014.

<sup>126</sup> France, Italy, Netherlands.

property or economic activity have been proffered,<sup>127</sup> as have trials in absentia.<sup>128</sup> Other jurisdictions have laws that allow for jurisdictional claims in the absence of the accused, but will not try a person, legal or natural, in absentia.<sup>129</sup>

The civil law approach is in stark contrast to the common law's tradition of different laws at state and federal levels and civil versus criminal distinctions. This organizational structure, combined with substantial discretion in deciding whether or not to take a case, exposes universal jurisdiction to the effects of criminal justice policy and subsequently possible gaps in accountability. The U.S., for instance, previously pursued extraterritorial prosecutions (especially for white-collar offences) only rarely. However, since the 1980s, extraterritorial prosecutions have become more common and more focused on national security matters and narcotics crimes.<sup>130</sup> Today, the human rights community has expressed serious concerns about the lack of access to judicial remedies in light of the recent narrowing of extraterritorial jurisdiction the U.S.<sup>131</sup> Despite the breadth of the doctrine of *respondeat superior*, the increasingly limited scope of extraterritorial U.S. jurisdiction runs the possibility of creating areas of impunity for corporate violations of international law.

Despite significant differences between civil and common law systems, most states acknowledge a variant of universal jurisdiction in their criminal justice system. This is particularly clear with regard to obligations established under international law to prosecute globally outlawed conduct, or so-called 'treaty crimes'.<sup>132</sup> As mentioned previously, some states target prosecution in specific areas, like violations of the conventions against terrorism,<sup>133</sup> corruption,<sup>134</sup> or the Palermo Convention against organized crime.<sup>135</sup> However, in these cases states do not permit domestic courts to directly apply norms of international law, but require domestic law as basis for a judgment.<sup>136</sup>

Only rarely have states addressed the problem of extraterritorial due process in criminal cases. Recently, courts in the U.S. required a sufficient nexus between the defendant and the U.S. be present so that application of U.S. law would not be unjust. Although only one criminal case has been dismissed for failure to satisfy this extraterritorial due process

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<sup>127</sup> See *France*.

<sup>128</sup> *France, Italy, Netherlands*; see also explanations infra under *aut dedere aut judicare* as some countries will rather use that jurisdiction, like *Finland*.

<sup>129</sup> Germany, Sweden.

<sup>130</sup> Michael Farbiarz, 'Extraterritorial Criminal Jurisdiction' (2016) 114 Mich L Rev 507, 512.

<sup>131</sup> See, e.g., Gwynne L Skinner and Beyond Kiobel, 'Providing Access to Remedies for Violation of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World' (2014) 46 Colum Hum Rights Law Review 158.

<sup>132</sup> See, for instance, *Italy, Finland, U.S.A.* This is important, because companies cannot be prosecuted at the International Criminal Court (ICC), see art 25 ICC Statute.

<sup>133</sup> <[http://www.planalto.gov.br/ccivil\\_03/\\_Ato2004-2006/2005/Decreto/D5639.htm](http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2005/Decreto/D5639.htm)> accessed 23 February 2018.

<sup>134</sup> <<http://www.oas.org/juridico/portuguese/treaties/b-58.htm>> accessed 23 February 2018.

<sup>135</sup> <[http://www.planalto.gov.br/ccivil\\_03/\\_ato2004-2006/2004/decreto/d5015.htm](http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/decreto/d5015.htm)> accessed 23 February 2018.

<sup>136</sup> See Brazil, Finland, Germany, Spain, Sweden.

doctrine, the doctrine may nevertheless influence prosecutors' decisions about whether to bring extraterritorial charges, including those against corporations.<sup>137</sup>

Overall, the universality principle seems well-established. It is a part of many international treaties and, as the country reports in this study show, is widely accepted as a basis for jurisdiction. That said, in looking at the enforcement rates listed in the country reports, universality appears largely unused, thereby perpetuating the notion that 'Everybody's problem is nobody's problem'.<sup>138</sup>

#### 4.6 Aut dedere aut judicare and Vicarious Jurisdiction

The principle of *aut dedere aut judicare* refers to the legal obligation states have to charge persons who have allegedly committed a serious crime if no other state has requested extradition.<sup>139</sup> The doctrine provides for presence-based universal jurisdiction over international crimes beyond the active and passive personality-based jurisdictions. Some states have codified the principle into domestic law and allow for prosecution of individuals so long as they are physically present in the state.<sup>140</sup>

Related to *aut dedere* is vicarious jurisdiction which allows a state to prosecute a crime on behalf of another state.<sup>141</sup> While this principle is frequently mentioned in academia, states rarely use it in practice.<sup>142</sup> Where it has been applied, it has been primarily used to amend weak jurisdictional principles based upon personality<sup>143</sup> or to provide extra protection for citizens who have been victim to crimes abroad.<sup>144</sup> Both principles have a strong civil law tradition and have taken root in South American countries,<sup>145</sup> but are generally not acknowledged in common law jurisdictions,<sup>146</sup> and thus have had limited effect.

#### 4.7 New Jurisdictional Approaches in the light of the UN Guiding Principles

Addressing alleged corporate wrongdoing needs new (and different) approaches as corporations, unlike human beings, are not born into a nation, but are established to engage in profitable business, which often results in dealings in a number of different states and along supply chains. As such, holding corporations accountable for wrongdoing becomes a complicated transnational issue that raises new jurisdictional problems. For instance, a corporate group's conduct may trigger a criminal investigation in one state but that state may be unable to assert a clear-cut claim of territorial jurisdiction for an alleged treaty crime along a supply chain. States have responded to this issue of negative jurisdictional conflicts

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<sup>137</sup> See *U.S.A.*

<sup>138</sup> For reports of non-use see *Brazil, Germany, U.S.A.*

<sup>139</sup> See *Finland*.

<sup>140</sup> *Finland, Switzerland, Netherlands*.

<sup>141</sup> Cedric Ryngaert, *Jurisdiction in International law* (OUP, Oxford 2008) 121.

<sup>142</sup> See *Germany, Switzerland*.

<sup>143</sup> See *Finland*.

<sup>144</sup> See *France*.

<sup>145</sup> See *Brazil*.

<sup>146</sup> See *U.S.A.*

by invoking international 'hard' and 'soft law'.<sup>147</sup> The translation of international obligations into the national criminal justice system involves several layers. In the case of 'hard law', ratification of the international document triggers mandatory implementation and enforcement on the national level. In the field of criminal law, states generally require a formal transfer of international obligations into statutes so that authorities have a legal basis upon which to act. In the case of 'soft law', the transfer into domestic law is significantly more complex as states are under no obligation (and normally have no predetermined procedure) to do so. Nevertheless, such laws can still shape domestic prosecution. For example, in setting standards for criminal justice policy in prosecuting corporations or for benchmarks establishing duties of care in areas like working conditions that can be applied in negligence claims.<sup>148</sup>

The formation of the *UN Guiding Principles*<sup>149</sup> resulted in a new initiative in Europe requiring EU Member States to protect against human rights abuses committed by third parties (including corporations) within their territory and/or jurisdiction. This requires taking appropriate steps to prevent, investigate, punish, and redress such violations through effective policies, legislation, regulations and adjudication.

In their efforts to comply with the *UN Guiding Principles*, EU Member States have released National Action Plans, which among other things, create business incentives for compliance with the principles (e.g., making corporations eligible for funding or for doing business with the government<sup>150</sup>). A large group of states have gone further by establishing a network of National Contact Points within the Organization for Economic Cooperation and Development (OECD) framework<sup>151</sup> that provides financial support for relevant initiatives.<sup>152</sup> While these initiatives enable states to stay out of the criminal law framework and associated jurisdictional challenges, the remedies provided may not live up to the remedies proffered in the *UN Guiding Principles*.<sup>153</sup>

In the states that allow for potential criminal prosecution of corporations, two approaches emerge. One group of states tend to embrace international law prosecution and have implemented international law in their domestic criminal codes that are accessible and manageable for law enforcement. In some states there is even a clear demand for strict application, although still subject to domestic procedure (e.g., discretionary power to

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<sup>147</sup> See Kenneth S. Gallant, 'Corporate Criminal Responsibility and Human Rights Violations: Jurisdiction and Reparations' (hereinafter: *Jurisdiction and Reparations*).

<sup>148</sup> See, for instance, *Switzerland*.

<sup>149</sup> <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> accessed 23 February 2018.

<sup>150</sup> See e.g., Germany, Italy, Netherlands.

<sup>151</sup> See Netherlands, but also Switzerland.

<sup>152</sup> See Dutch Government on Corporate Social Responsibility on its website. Retrieved from: <<https://www.rijksoverheid.nl/onderwerpen/maatschappelijk-verantwoord-ondernemen/inhoud/maatschappelijk-verantwoord-ondernemen-in-de-praktijk>> accessed 23 February 2018.

<sup>153</sup> Kenneth S. Gallant, *Corporate Criminal Responsibility and Human Rights Violations: Jurisdiction and Reparations* (hereinafter: *Jurisdiction and Reparations*).

prosecute).<sup>154</sup> Other states take a more reluctant approach to international prosecution. This appears to occur for various reasons, including the protection of democratic legitimization of penal power and maintaining state sovereignty. This group includes a diverse array of states, including China, the U.S., and Switzerland.

Nevertheless, territoriality remains the default jurisdictional basis for criminal prosecution, including the prosecution of corporations, despite the increasingly relevant topic of justice beyond borders. The traditional forms of extraterritorially (i.e., personality principles) have been supplemented by concepts extending jurisdiction via vicarious and universal jurisdiction to cases where a competent state does not have a genuine interest of its own to prosecute.<sup>155</sup>

## 5 Prosecuting Cross-Border Cases and Strategic Litigation

The majority of states do not appear to have a specific normative framework for prosecuting cross-border cases or lots of experience doing it<sup>156</sup> and, practically speaking, much depends on mutual legal assistance and a determination. In most states, defendants are not required to be present during criminal investigations but must be present once a case is brought to court.<sup>157</sup> Where a corporation is required to stand trial, some states notify the corporate headquarters and require an individual to be specially designated to represent the corporation and be present at the hearing.<sup>158</sup> Other states appoint a court representative<sup>159</sup> or allow for proceedings against corporations *in absentia* as described above.<sup>160</sup>

In looking at the case law described in the country reports in terms of volume of litigation and coverage of prominent cases, it appears that a state's jurisdictional framework is not the only important component in solving the issue of available remedies. It is necessary, but not sufficient by itself to secure a remedy. Often, a structure to assist victims to recover reparations for corporate human rights abuses is at least as important. There are a number of differences between states where cases have been brought before courts and those that have avoided doing so, the most salient of which are litigation resources, litigation assistance, and strategic knowledge about law enforcement, which is typically provided by NGOs. Prominent cases that illustrate the importance of support for victims include the case against Chiquita in the U.S., where despite the unsuccessful use of the Alien Tort Statute to substantiate jurisdiction, the case will move forward on other grounds.<sup>161</sup> The case against

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<sup>154</sup> See, for instance, *Germany, Finland*.

<sup>155</sup> On the issue of a 'genuine link': Sabine Gless, *Internationales Strafrecht, Grundriss für Studium und Praxis* (2<sup>nd</sup> edn, Helbing Lichtenhahn, Basel 2015) 48.

<sup>156</sup> See Mark B. Taylor, Robert C. Thompson and Anita Ramasastry, 'Overcoming Obstacles to Justice', *Fafo Report*, 2010, p. 18.

<sup>157</sup> See, for instance, *Germany*.

<sup>158</sup> See, for instance, *Spain*.

<sup>159</sup> See, for instance, *France*.

<sup>160</sup> See, for instance, *Netherlands*.

<sup>161</sup> See Matt Kennard, 'Chiquita Made a Killing From Colombia's Civil War' *Pulitzer Center on Reporting* (27 January 2017); Joe Sandler Clarke, 'Terry Collingsworth: The Globe-Trotting Human Rights Lawyer Taking on Nestlé and ExxonMobil' <<http://pulitzercenter.org/reporting/chiquita-made-killing-colombia%E2%80%99s-civil-war-will-their-victims-finally-see-justice>> accessed 23 February 2018; *The*

Nestle and Cargill for use of child slave labour in the production of chocolate was also filed in the U.S. based upon the Alien Tort Statute and initially saw some movement forward, but was recently overturned by a U.S. district court judge.<sup>162</sup> Despite variable success in the courtroom, international cases involving the criminal prosecution of corporations have triggered an important public debate about the usefulness and legitimacy of prosecuting corporations for crimes abroad.<sup>163</sup>

Cases in larger countries, like the U.S., tend to receive more publicity, and decisions limiting American extraterritorial jurisdiction have drawn the attention of the mainstream media, generating speculation and controversy.<sup>164</sup> However, in other states, cases involving severe human rights violations, serious pollution of the living environments of indigenous people, or other major breaches of international standards (e.g., refining precious raw materials acquired illegally in conflict zones), have also garnered media coverage.<sup>165</sup> This includes the 2010 Dutch case against *Trafigura*, a company with offices in London, Amsterdam, and Geneva, that was convicted in a Dutch court of dumping waste in the harbour in Ivory Coast in 2006.<sup>166</sup> In Australia, tribal people from Papua New Guinea successfully settled a case in the state of Victoria against Broken Hill Proprietary Company Ltd. and its subsidiary alleging one or both companies had polluted a river catchment area of which they were the

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*Guardian* (2 September 2015), <<https://www.theguardian.com/global-development-professionals-network/2015/sep/02/terry-collingsworth-the-david-taking-on-the-corporate-goliaths>> accessed 23 February 2018.

<sup>162</sup> See Edvard Pettersson, 'Child Slavery Claims Against Nestle, Cargill Get One More Chance' (*Bloomberg*, 9 January 2017), <<https://www.bloomberg.com/news/articles/2017-01-09/child-slavery-claims-against-nestle-cargill-get-one-more-chance>> accessed 15 February 2018 (describing suit claiming Nestle and Cargill employees knew plaintiffs were forced into slavery as boys to harvest cocoa pods in Ivory Coast to produce chocolate that corporate advocates say could open the door to a flood of new cases). See Daniel Fisher, 'Judge Tosses Nestle Suit Over Child Slavery in Africa' (*Forbes*, 13 March 2017), <<https://www.forbes.com/sites/danielfisher/2017/03/13/judge-tosses-nestle-suit-over-child-slavery-in-africa/#30c8256928d1>> accessed 15 February 2018.

<sup>163</sup> As have, for instance, the following cases: U.S. Supreme Court, *Kiobel v Royal Dutch Petroleum Co.*, 569 U.S. 2013; Tribunal cantonal, Canton de Vaud, Decision from 17 September 2013, Nr. PE12.010550-FMO and Swiss Bundesgericht 6B\_7/2014 from 21 July 2014; *Prosecutor v Van Anraat*, Netherlands, LJN: BA6734, Gerechtshof's-Gravenhage, 2200050906-2, 9 May 2007; Arrêt du Tribunal Administratif de Toulouse, 2ieme chamber, 16 May 2006, n.0104248; *United States of America v Carl Krauch, et al.*, (I.G. Farben, see for documentation <<http://www.profit-over-life.org/international/deutsch/index.html>> accessed 23 February 2018).

<sup>164</sup> See *RJR Nabisco, Inc. v The European Community*, 136 S. Ct. 2090, (2015); *Daimler AG v Bauman*, 134 S.Ct. 746, 751 (2014); *Kiobel v Royal Dutch Petroleum Co.* 133 S.Ct. 1659, 1669 (2013). For a discussion of the controversy see, Eric Posner, The United States Can't Be the World's Courthouse, *Slate* (Chicago, 24 April 2013), <[http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2013/04/the\\_supreme\\_court\\_and\\_the\\_alien\\_tort\\_statute\\_ending\\_human\\_rights\\_suits.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/04/the_supreme_court_and_the_alien_tort_statute_ending_human_rights_suits.html)> accessed 23 February 2018; Sara Murphy, 'Shell Wins; the World Loses', *The Motley Fool* (Alexandria (VA), 17 April 2013), <<https://www.fool.com/investing/general/2013/04/17/shell-wins-the-world-loses.aspx>> accessed 23 February 2018.

<sup>165</sup> See Spain, Sweden.

<sup>166</sup> Rb. Amsterdam 23 July 2010, ECLI:NL:RBAMS:2010:BN2149, r.o. 10.

traditional owners or possessors.<sup>167</sup> In Germany, due to the absence of criminal liability of corporations, prosecutors target the individual criminal liability of corporate executives.<sup>168</sup>

The public debate regarding corporate responsibility for human rights violations is often initiated by NGOs supporting victims and highlights the obstacles to effective enforcement of international human rights standards (e.g., a lack of binding standards for monitoring foreign subsidiaries and supplier companies, strict distinction between the responsibility of the parent company and the responsibility of its subsidiaries). However, even with NGO support, successful enforcement is the exception rather than the rule. For example, the case brought against *Argor-Heraeus* in Switzerland for exploitation of illegally mined gold in the Democratic Republic of Congo was dismissed despite the support of three international NGO groups and considerable public outcry.<sup>169</sup>

Unfortunately, even where the exercise of jurisdiction is appropriate and a remedy is available, getting a case before a court is an entirely separate hurdle.<sup>170</sup> This divide between academia and the real world raises doubt about the appropriateness of criminal justice tools in these types of cases. From the perspective of the victim, enforcement of restitution is often the primary goal. However, authority to require reparations from corporations lies within the domestic judiciary because international courts have no enforcement authority over legal persons. Enforcing reparations raises complex jurisdictional issues which are addressed in the specialty report submitted by Kenneth Gallant where the author asserts that criminal prosecution of corporations may be less effective than finding ways to increase the domestic state's authority to encourage voluntary corporate compliance.<sup>171</sup> However, as is always the case in transnational frameworks, cooperation with other states, international organizations, and private institutions, especially NGOs, is necessary to succeed.<sup>172</sup>

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<sup>167</sup> See *Dagi and Others v The Broken Hill Proprietary Company Ltd and Another (No 2)* [1997] 1 VR 428 ('*Dagi No. 2*'). For information on Australia's use of its domestic criminal code to prosecute corporations for international crimes, see Joanna Kyriakakis, 'Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code', (2007) 5, *Journal of International Criminal Justice*, 809, 814–816.

<sup>168</sup> See *Frankfurter Neue Presse* of 5 December 2015, <<http://www.fnpp.de/nachrichten/politik/2015/12/05/Die-Menschen-hatten-Todesangst-ldquo-art-673,1736733>> accessed 1 September 2016.

<sup>169</sup> See, Davide Scruzzi, 'Goldraffinerie steht auch ohne Straftaten in der Kritik' *Neue Zürcher Zeitung* (Zürich, 2 June 2015) <https://www.nzz.ch/schweiz/goldraffinerie-steht-auch-ohne-straftaten-in-der-kritik-1.18554184> accessed 15 February 2018; Mark Pieth, *Wirtschaftsstrafrecht* (Helbing Lichtenhahn, Basel 2016) 16, 234; cf. Einstellungsverfügung der Bundesanwaltschaft vom 10 March 2015 in Sachen A. und B. betreffend Verdacht der Geldwäscherei und Gehilfenschaft zu Kriegsverbrechen durch Plünderung (Ruling Abandoning Proceedings of the Office of the Attorney General of Switzerland); see also UN Security Council 16 October 2002 (S/2002/1146); UN Security Council 23 October 2003 (S/2003/1027); UN Security Council 26 July 2005 (S/2005/436); UN Security Council 27 January 2006 (S/2006/53); James G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources Open Society Justice Initiative Publication* (Open Society Institute 2011).

<sup>170</sup> For example the Al-Haq case against Riwal, *Böhler Advocaten*, retrieved from: <<http://www.alhaq.org/images/stories/PDF/accountability-files/Complaint%20-%20English.pdf>> accessed 7 September 2016.

<sup>171</sup> See Jurisdiction and Reparations.

<sup>172</sup> *id.*

## 6 Conclusion

The country reports submitted for this study provided the valuable information on the topic of jurisdictional issues in the realm of corporate criminal liability that made possible a discussion of the jurisdictional challenges of corporate criminal liability within a supply chain. The responses illustrated that, at least in principle, the traditional notions of jurisdiction can be developed into a concept that addresses the challenges of corporate criminal liability raised by the *UN Guiding Principles*. Most states are generally well prepared to address the particular challenges of jurisdictional issues in cross-border contexts involving corporate criminal accountability.

Despite their preparedness, states take different approaches to the prevention and reduction of human rights violations in business. This is in part related to the variability in substantive law with respect to foundations of criminal corporate liability, but also to procedural differences among states. A survey of the state approaches to prosecution revealed that a broad approach attempting to cover all possible corporate crimes combined with a zero-tolerance approach to prosecution more easily triggers jurisdiction than a narrow provision covering only few listed crimes. A review of approaches by states that refrain from using criminal law for corporate liability revealed the potential for an efficient remedy via the use of administrative law. Other states may have to make either some legal changes or modify – more or less radical – their practice of using the various jurisdictions.

The findings do not contradict the prevailing notion that territoriality is the basic principle of jurisdiction, even when states adhere to international obligations of charging legal persons for treaty crimes. At the same time, the country reports provide evidence to confirm the notion that all states acknowledge several principles of extraterritorial jurisdiction, including the most commonly recognized principle of active personality. Whether such jurisdictional extensions apply in situations of alleged abuse along a corporate supply chain is, however, determined by many factors, not the least of which is the respective substantive law. This is not just because jurisdictions beyond territoriality are often limited by the requirement of double criminality, but also because legal persons must be acknowledged as persons under the active personality principle, and a state's jurisdictional boundaries cannot be extended to corporate activity.<sup>173</sup> As such, jurisdiction based upon territoriality is likely the best solution for an efficient remedy.

Nevertheless, the growing demand by human rights lawyers, activists, and civil society to hold corporations accountable along their supply chains, including by means of criminal prosecution, is changing the legal climate around corporate liability. The fact that some jurisdictional concepts are not applied to legal persons has been accepted for decades but today, corporate accountability and compliance with law and ethical standards is an issue in many states. In Europe in particular, civil society movements aim to change the law

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<sup>173</sup> id.

through public initiatives,<sup>174</sup> government-appointed investigative committees<sup>175</sup>, and public debates between stakeholders on both sides of the issue.<sup>176</sup> In other states, the discussion appears to be limited to a debate on the interpretation and application of existing laws within the legal community, which can also occasionally result in governmental action.<sup>177</sup>

The current project highlighted the different approaches to corporate criminal liability across states. The country rapporteurs' answers varied, partly depending on their state's geopolitical self-concept. In states that have explicitly committed themselves to a human rights agenda and function as platforms for international dialogue<sup>178</sup> or hubs for international business,<sup>179</sup> it appears that civil society movements press for,<sup>180</sup> and governments cater to,<sup>181</sup> an understanding of corporate responsibility. This appears to be the case with European states in particular, although European initiatives do not specifically demand changes to domestic criminal law. Country reports from states outside Europe tend to take a more reluctant approach to corporate criminal liability.<sup>182</sup>

An overall willingness to comply with international law and a demand to establish clear and valid jurisdictional links is apparent from the country report submitted. This report and the resolutions adopted during the Panel 4 Basel colloquium preparing the 20<sup>th</sup> AIDP International Congress of Penal Law advocate for a new assessment of territorial jurisdiction that addresses corporate criminal liability in the domestic criminal justice systems. It is anticipated that this could be achieved by restructuring the active personality principle and rethinking the use of universal jurisdiction while also creating an international framework that addresses the principle of *ne bis in idem* and prevents arbitrary and unfair prosecution.

International and national movements such as the negotiation and adoption of the *UN Guiding Principles* and subsequent development of national action plans in EU Member States, or the Swiss '*Konzernverantwortungsinitiative*' remind states that they have positive obligations under international human rights law to ensure that victims of serious human rights violations have access to effective remedies and that these duties have a direct impact upon resource allocation, investigative and prosecutorial decisions, and requests for mutual

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<sup>174</sup> For example, the Swiss Konzern Initiative, <<http://konzern-initiative.ch/>> accessed 15 February 2018; and the AVSI Foundation, <<http://www.avsi.org>> accessed 15 February 2018.

<sup>175</sup> For example, the Italian Confindustria, <<http://www.confindustria.it/Conf/link.nsf/CSR?openform>> accessed 15 February 2018; and Non Solo Ambiente, <<http://nonsoloambiente.it/category/sostenibilita/csr/>> accessed 15 February 2018.

<sup>176</sup> See also <<http://www.csr.unioncamere.it/P42A0C0S86/Documenti.htm>> accessed 23 February 2018.

<sup>177</sup> One example of this is Australia, see Catherine Branson, 'Business and Human Rights: The New Global Consensus?' (2014) 16, *Flinders Law Journal* 187, 198; and UN Global Compact, '*Towards an Australian National Action Plan on Business & Human Rights: Business Roundtable Consultations*', available at <<http://www.unglobal.com-pact.org.au/events/towards-an-australian-national-action-plan-on-business-human-rights-business-roundtable-consultations/>> accessed 23 February 2018.

<sup>178</sup> See, for instance, *Austria's Proposals for Reform*.

<sup>179</sup> See, for instance, *Switzerland*, Conclusion.

<sup>180</sup> Like in *Switzerland*.

<sup>181</sup> Like in *Sweden*.

<sup>182</sup> See, for instance, conclusions in *Australia, Brazil, China*.

legal assistance.<sup>183</sup> The principles, however, also point out that criminal litigation is just one means to an end and is not appropriate in all situations. Nevertheless, the threat of criminal punishment can be an efficient way to encourage companies to comply with international law.

Against the backdrop of international 'hard' and 'soft law',<sup>184</sup> as well as NGO proposals,<sup>185</sup> states are obligated to a) ensure that their legal framework enables the investigation and prosecution of human rights abuses that occur in corporate business activity, including within supply or distribution chains, (b) commit adequate resources for the timely investigation and prosecution of alleged corporate human rights abuses, c) provide victims of human rights violations with legal assistance, and d) efficiently implement remedies (which can often be improved through the inclusion of NGOs). Overall, states must ensure that they administer justice in such a manner that is transparent, accessible, and provides accountability while simultaneously ensuring that jurisdictional rules are shaped and applied in a way that fulfils the mandate of the *UN Guiding Principles*.

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<sup>183</sup> <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> accessed 23 February 2018.

<sup>184</sup> *OECD Guidelines for Multinational Enterprises* (2011) <<http://mneguidelines.oecd.org/annualreports/ontheguidelines.htm>> accessed 23 February 2018; the EU Directive 2014/95/EU, OJ L 330, 15 November 2014.

<sup>185</sup> *The Corporate Crimes Principles*, Amnesty International and the International Corporate Accountability Roundtable (2016) <<http://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf>> accessed 23 February 2018.

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# FINAL RESOLUTIONS ON PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW: JURISDICTIONAL ISSUES

## *Preamble*

*Accepting* that companies have an important part to play in global efforts to promote human rights and that their business activities may give rise to conduct that is prohibited under international human rights law and domestic criminal law;

*Acknowledging* the particular challenges to corporate accountability in cross-border contexts due to *inter alia* global economic inequalities, disparities in state institutional capacity, the use of supply chains, distribution chains, and corporate arrangements involving different legal entities in business operations;

*Considering* that states take different approaches to the prevention and suppression of human rights abuses in business situations and that those measures may take the form of criminal, administrative, and civil laws, as well as support for soft law or self-regulation initiatives;

*Affirming* the general principle of territoriality, such that states may assert jurisdiction over conduct that is perpetrated in their territories or that result in harm in their territories, *but also affirming* that active personality is a widely recognized basis for jurisdiction and that passive personality and universal jurisdiction are regarded as appropriate to certain offences in international and domestic criminal law;

*Stressing* that any state's ability to ensure respect for human rights in business operations will depend, in part, on its domestic corporate and/or criminal laws and that these legal frameworks may need revision, especially with respect to the issue of jurisdiction;

*Observing* that human rights abuses in cross-border business situations do not typically involve positive conflicts of jurisdiction and *asserting* that states must strive to prevent negative conflicts, as well as disproportionate or arbitrary punishment of alleged corporate offenders;

*Reiterating* that states have positive obligations under international human rights law to ensure that victims of serious human rights violations have access to effective remedies and that these duties affect resources allocation decisions, investigative and prosecutorial discretions, and the handling of requests for mutual legal assistance;

*Noting* the importance of international initiatives in this area, including the United Nations' *Guiding Principles on Business and Human Rights* (2011),<sup>1</sup> the *OECD Guidelines for Multinational*

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<sup>1</sup> <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)>.

*Enterprises* (2011),<sup>2</sup> the EU Directive 2014/95/EU,<sup>3</sup> and the *Corporate Crimes Principles* of Amnesty International and the International Corporate Accountability Roundtable (2016)<sup>4</sup>;

*Recalling* the resolutions of previous AIDP Congresses, in particular, on international crimes and domestic criminal law,<sup>5</sup> concurrent criminal jurisdiction, and universal jurisdiction;<sup>6</sup>

*Adopts the following resolutions:*

1. States must ensure that their legal frameworks enable the investigation and prosecution of human rights abuses that occur in a company's business activity, in its supply or distribution chain, and in its other business arrangement that involve multiple legal entities ("corporate human rights abuses").

2. Substantive and procedural criminal laws must be used to enhance respect for international human rights law and to contribute to holding companies accountable for corporate human rights abuses. Therefore, amongst other things, states must:

a. define offences and corporate criminal liability rules in a manner that enables effective investigation, prosecution, and adjudication of corporate human rights abuses;

b. consider making corporate liability conditional on factors such as control, negligence, or lack of due diligence;

c. define concepts of corporate liability so as to have regard to the economic realities of business operations and not just the legal principles associated with incorporation (e.g., separate legal personality and limited liability where in fact hierarchical control or de facto dependence shape a corporate relationship); and

d. encourage their competent investigative and prosecutorial authorities to exercise discretions with a view to fulfilling international obligations to protect human rights and to provide an effective remedy for victims of corporate human rights abuses.

3. States must define their jurisdictional rules in a way that enables companies to be held accountable for corporate human rights abuses.

4. In pursuit Resolution 3, states must assert jurisdiction over the investigation and prosecution of corporate human rights abuses when their territory was the place of the occurrence of harm as well as when it was the place of the occurrence of the wrongful conduct, in whole or in part.

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<sup>2</sup> <<http://mneguidelines.oecd.org/annualreportsontheguidelines.htm>>.

<sup>3</sup> OJ L 330, 15 November 2014.

<sup>4</sup> <http://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf>.

<sup>5</sup> Fourteenth International Congress of Penal Law, Vienna, 2–7 October 1989.

<sup>6</sup> Third International Congress of Penal Law, Palermo, 3–8 April 1933 and Thirteenth International Congress of Penal Law, Cairo, 1–7 October 1984; Eighteenth International Congress of Penal Law, Istanbul, 20–27 September 2009.

5. To make full use of the territoriality principle, states must:
  - a. assert jurisdiction over the investigation and prosecution of corporate conduct where a company acted or should have acted in its territory, including by being negligent in its organization and omitting to control others; and
  - b. recognize that the relevant links to its jurisdiction may include the place where an agent was physically present at the time of the conduct or where the center of main interest or seat of relevant companies are, depending on the rules for attributing guilt to corporations in its domestic law.
6. States must assert active personality jurisdiction over companies incorporated under their domestic laws as well as over companies whose center of main interest (e.g., their principal place of business) is in their territories.
7. States whose nationals or residents have been harmed by corporate human rights abuses must assert passive personality jurisdiction if those victims would otherwise be without an effective remedy (e.g., because another state with jurisdiction is unable or unwilling to act).
8. States that assert universal jurisdiction must extend this ground of jurisdiction to corporations involved in offences that correspond to the most serious human rights abuses. Where states make the exercise of universal jurisdiction conditional on other factors (e.g., the presence of the suspect in their territories), they must interpret those conditions with a view to ensuring corporate accountability.
9. States have positive obligations under international human rights law to provide victims of human rights violations with legal assistance, and a remedy. In pursuit of this obligation, states must:
  - a. assist each other in their efforts to investigate and prosecute companies for alleged corporate human rights abuses, for instance, by obtaining and providing evidence and technical assistance;
  - b. commit adequate resources for the timely investigation and prosecution of alleged corporate human rights abuses; and
  - c. ensure that they administer justice in such cases in a manner that is transparent, accessible, and accountable, including to victims.
10. Further to Resolution 9 and so as to ensure maximum access to remedies, states must:
  - a. provide an effective procedure by which victims can recover reparations for corporate human rights abuses; and
  - b. use their enforcement jurisdiction to the maximum extent possible in keeping with rights to due process, to enable victims to recover under civil, criminal, or administrative judgments or orders by other states.



## **TRANSVERSAL REPORTS**



# CORPORATE CRIMINAL RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS: JURISDICTION AND REPARATIONS

By *Kenneth S. Gallant\**

## 1 Executive Summary

Modern prosecutions at international criminal courts and tribunals have demonstrated that the resources available for reparations and restitution from individuals convicted of core international crimes is grossly insufficient to meet even basic restitutionary needs. Most of the wealth that might exist as a result of international crimes is likely to be in the hands of corporations or other artificial persons who have gained property and income through human rights violations. None of the international criminal courts and tribunals (ICCTs) has adjudicative jurisdiction over artificial persons of any sort, so that any progress on restitution and restorative justice must come through national tribunals. This applies to both core international crimes and the broader category of human rights treaty crimes which are outside the authority of ICCTs.

Many obstacles to reparations for human rights violations related to business activities arise from the international and national laws of jurisdiction. Rules of prescriptive, adjudicative, and enforcement jurisdiction combine with substantive rules of criminal law to make adequate reparations for human rights related business crimes difficult to achieve.

The Guiding Principles on Business and Human Rights (the '*Ruggie Principles*'), adopted by the United Nations Human Rights Council, address prevention, monitoring, and remediation of business participation in human rights abuses of all kinds. Application of several of the Principles can help states provide a jurisdictional framework for reparations for business-related human rights violations.

There are some signs of progress in recent decades. More states are now willing to exercise criminal jurisdiction over corporations. New human rights treaties require states to hold artificial persons liable for violations, criminally or otherwise. Objective territorial jurisdiction (sometimes called 'effects' jurisdiction) is ever more clearly permissible when outside activity directly causes criminal results in states. Finally, the rule against enforcing criminal law judgments across borders is beginning to decline, making the shielding of assets from claims for restitution and restorative justice through criminal proceedings much more difficult.

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Nonetheless, many obstacles to transnational enforcement of criminal judgments remain. Given trends in the international law of jurisdiction, it may turn out that civil judgments of restitution and reparation will be easier to obtain and enforce than criminal judgments.

## **2 Introduction**

Jurisdiction features prominently in discussion of responsibility for international crimes, including responsibility of corporations and other artificial persons for these crimes. This is true both of the so-called 'core' international crimes (genocide, crimes against humanity, and war crimes) as well as the much broader set of crimes and human rights violations condemned in international treaty law.

The connection of jurisdictional issues and corporate responsibility to certain specific purposes of outlawing these acts is much less prominent. Of the many goals underlying criminalization, this report will consider only one, restitution or reparations for victims.

This report will cover two issues. First, it will examine how the international law of criminal jurisdiction either promotes or obstructs the use of criminal law to achieve reparative justice for victims of international crimes. Second, it will consider the national and international exercises of this jurisdiction necessary to implement the ability to provide reparations for corporate violations of human rights.

These two issues address the conditions necessary for reparations to be effective as part of a legal response to corporate violations of human rights. This report will address issues of the general part of criminal law, such as liability for the acts of others, to the extent that the National Reports demonstrate this is necessary. It will do the same for issues of corporate responsibility, such as the relationship between parent and subsidiary corporations, also raised in the National Reports. In fact, the shaping of these substantive doctrines by the law of jurisdiction is one of the more important developments that the National Reports reveal to us.

### **2.1 Corporate reparations for violations of internationally-recognized human rights: The UN framework**

United Nations documents set out a framework for providing remedies for violations of international human rights law (the general law protecting human rights) and international humanitarian law (the law of armed conflict). This framework includes remedies for violations committed by corporations and other so-called 'legal persons.' These documents do not create any new international obligations for states, individuals, or business organizations. They are so-called 'international soft law' instruments. Yet these documents do include recommendations that states change their 'hard law' of criminal, administrative, and/or civil liability of corporations.

The first is the 2005 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious

Violations of International Humanitarian Law,<sup>1</sup> from the UN General Assembly. This took its inspiration from several treaties and other international documents creating or asserting a duty to provide for remedies for victims of violations of international human rights law and international humanitarian law.<sup>2</sup> It recommended states use their national 'hard law' to provide this right to a remedy and reparation.

The second is the 'Guiding Principles on Business and Human Rights'<sup>3</sup> adopted in 2011 by the UN Human Rights Council. This document is known as the '*Ruggie Principles*' for the Special Representative of the Secretary General who developed them. Because they are aimed specifically at improving business practices, the *Ruggie Principles* are more specialized than the 2005 Basic Principles. Within the business context, the *Ruggie Principles* are more comprehensive, because they systematically address prevention of abuses as well as remedy. The *Ruggie Principles* also set out a definition of the 'human rights' being defended:

The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.<sup>4</sup>

This technically leaves out violations of international humanitarian law. It is hard to imagine that there is any intention to leave the mass violence of armed conflict and related wrongs unremedied, especially since the 2005 UN Basic Principles addressed remedies for serious violations of international humanitarian law.

The *Ruggie Principles* do not set out a requirement of criminalization of corporate actions which violate international human rights. The question of what human rights violations in which corporations are implicated should be criminalized and what the elements of those

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<sup>1</sup> UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. 60/147 (2005) paras. 18-23 (the discussion in this Report will omit "guarantees of non-repetition," because these guarantees are more about prevention of subsequent abuse than remedying prior injury). For core international crimes, see Rome Statute of the International Criminal Court (1998) art 74(2) (restitution, compensation, rehabilitation). For the most recent consideration of the issue by the ICC, see *Prosecutor v Lubanga*, Reparations Judgment with Amended Principles of Reparations and Reparations Order, ICC-01/04-01/06 and Annex A (App Ch 2015). Only individuals can be required to pay reparations in the ICC, although states and others may voluntarily contribute to the Trust Fund for Victims. For the modern origin of 'full reparation' as the standard for remedies for international law violations generally, see *Chorzow Factory* (Merits), Judgment, PCIJ, Series A, No 17, p 47-48 (1928).

This Report does not address whether the type and quantum of reparations in business-related human rights cases is or should be defined by public international law, by private international law, by national law, or by some other source of law. That is a matter left open by all of the UN documents.

<sup>2</sup> UN Basic Principles (2005) preamble.

<sup>3</sup> Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, endorsed by Human Rights Committee Res 17/4 (2011) (*Ruggie Principles* (2011)).

<sup>4</sup> *Ruggie Principles* (2011) Principle 12.

crimes should be is beyond the scope of this Report as well.<sup>5</sup> The *Ruggie Principles* do recommend that states use 'hard law' of some sort, whether civil, criminal, or administrative, to back up the voluntary mechanisms that they hope will be generally accepted to prevent, monitor, and remedy human rights violations.

The *Ruggie Principles* document makes almost no reference to the 2005 UN Basic Principles. A document which brings them together is a Report prepared for the UN High Commissioner on Human Rights ('*Zerk Report*', named for author *Jennifer Zerk*).<sup>6</sup> The *Zerk Report* was one of the preparatory documents for the 2016 Report of the UN High Commissioner for Human Rights, 'Improving accountability and access to remedy for victims of business-related human rights abuse', with its Annex 'Guidance to Improve corporate accountability and access to judicial remedy for business-related human rights abuse' (2016 Accountability/Guidance).<sup>7</sup> As of February 2017, this remains a Report of the UN High Commissioner for Human Rights and has not been adopted by the Human Rights Committee or the General Assembly.

The 2016 Guidance is a soft law document aimed at states.<sup>8</sup> It makes 'Recommendations' in the main Report and setting out 'Policy Objectives' in the Annex, but its tone is more forceful than that of the first two documents. Unlike the first two documents, it does not explicitly deny creating new international legal obligations of states. Like the earlier documents, the 2016 Guidance recommends that states use their 'hard law' to deal with human rights violations.

The United Nations is not the only body emphasizing reparations for crimes under international law with corporate involvement. As *amicus curiae* (friend of the court) in a famous United States Supreme Court case, *Kiobel v. Royal Dutch Petroleum*,<sup>9</sup> the European Union stated that there is a

growing recognition in the international community that an effective remedy for repugnant crimes in violation of fundamental human rights includes, as an essential component, civil reparations to the victims.<sup>10</sup>

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<sup>5</sup> Compare, eg, Rome Statute of the International Criminal Court (1998) arts 5-8 (setting out crimes in violation of international humanitarian law) with, eg, International Covenant on Civil and Political Rights (1966) (setting out individual human rights in the civil and political realm).

<sup>6</sup> Jennifer Zerk, 'Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies' (UN OHCHR (2014)) (*Zerk Report* (2014)).

<sup>7</sup> UN High Commissioner for Human Rights, 'Improving accountability and access to remedy for victims of business-related human rights abuse' with Annex, 'Guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse,' UN Doc. A/HRC/32/19 (2016) (advance edited version) (Accountability/Guidance (2016)). There is an addendum to the Accountability/Guidance (2016), 'Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance,' UN Doc. A/HRC/32/19/Add.1 (advance edited version) (Guidance Notes (2016)).

<sup>8</sup> For the emphasis on states as the target audience, see Accountability/Guidance (2016) para 19.

<sup>9</sup> US *Kiobel v Royal Dutch Petroleum*, 569 US \_\_\_ (2013).

<sup>10</sup> US *Kiobel*, Brief of the European Commission on behalf of the European Union (2012) 17-18.

The 2005 Basic Principles and Guidelines are addressed to whoever might cause a gross or serious violation – including ‘a person, a legal person, or other entity.’<sup>11</sup> The inclusion of ‘legal person’ here means that national law and national courts should enforce these types of remedies against corporations and other legal persons who are responsible for the violations. This is true whether the corporate crime involved is one of the core international crimes (i.e., international humanitarian law) or a treaty-based or other crime which invades an internationally-recognized human right.

The 2005 Basic Principles consider restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition as possible means of reparation for these violations. The document sets out definitions which are worth quoting at length:

19. Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.
20. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
  - a) Physical or mental harm;
  - b) Lost opportunities, including employment, education and social benefits;
  - c) Material damages and loss of earnings, including loss of earning potential;
  - d) Moral damage;
  - e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
21. Rehabilitation should include medical and psychological care as well as legal and social services.
22. Satisfaction should include, where applicable, any or all of the following:
  - a) Effective measures aimed at the cessation of continuing violations;
  - b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
  - c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
  - d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

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<sup>11</sup> UN Basic Principles (2005) art 15 (emphasis added).

- e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
  - f) Judicial and administrative sanctions against persons liable for the violations;
  - g) Commemorations and tributes to the victims;
  - h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.
23. Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:
- a) Ensuring effective civilian control of military and security forces;
  - b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
  - c) Strengthening the independence of the judiciary;
  - d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
  - e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
  - f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
  - g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
  - h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.<sup>12</sup>

These remedies should not be considered exclusive. Nor will all of them be required in every case. What is important is that a corporation involved in a human rights violation which has disrupted the lives of many people, such as poisoning the drinking and irrigation water in a given place, may not simply be able to throw some money into a pot and leave.

The 2011 *Ruggie Principles* do not attempt to define or re-define these substantive remedies for business violations of human rights. Rather, they set forth courses of action that businesses ought to take to develop systems for preventing adverse human rights impacts from their activities, for monitoring whether such impacts are occurring, and for promptly remedying such impacts. The *Ruggie Principles* are neutral as to whether the remedies should come through criminal, administrative, and/or civil processes, so long as there is state law available to victims if voluntary remediation fails.<sup>13</sup>

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<sup>12</sup> UN Basic Principles (2005) arts 19-23.

<sup>13</sup> See Ruggie Principles (2011) parts II (principles 11 & 22) & III.

The 2016 Accountability/Guidance suggests states create both public (criminal and/or administrative) law sanctions and private (civil) law claims for corporate violations of international human rights abuses. Surprisingly, the 2016 Accountability/Guidance does not specifically address transnational enforceability of either civil or criminal judgments, though it does suggest greater cooperation between states in enforcement.<sup>14</sup>

This Report considers the jurisdictional prerequisites for effective reparation through the criminal process. It examines whether and how the law of jurisdiction can promote effective remedies for human rights violation through that process. The *Ruggie Principles* themselves are based on the idea that effective national laws on human rights are those that encourage business to monitor human rights effects and promote human rights voluntarily, including providing remedies before being forced to do so by courts.<sup>15</sup>

## 2.2 Reparation and jurisdiction

The relationship of restitution and reparation to decisions on corporate criminal liability and extraterritorial jurisdiction over corporations for international crimes is complex. It involves all three aspects of jurisdiction: prescriptive (legislative), adjudicative (judicial), and enforcement.

### 2.2.1 *Prescriptive and adjudicative jurisdiction: Defining crimes and sanctions*

In the literature, prescriptive and adjudicative jurisdiction over crime are generally seen as identical or very similar. For purposes of this discussion on effectiveness of reparations for crime, it will be useful to make a distinction.

Whether a state may define a crime where the acts or criminal results occurred outside the territory of a state and/or the perpetrator is a foreign national will be treated as a question of prescriptive jurisdiction. The essential question is whether the state has the authority to make law for the matter.

Whether a state has given its courts authority to impose a given sanction for a crime (e.g., restitution of property to victims) will be treated as a matter of jurisdiction to adjudicate. The question is whether a court acts within its sentencing powers in making such a judgment.

Technically, this distinction is a bit artificial. Nonetheless, it will be useful below in separating issues of crime (or cause of action) and sanction.

### 2.2.2 *Outline of the scheme of jurisdiction in international law*

This report assumes knowledge of the system of international and transnational jurisdiction over criminal law, which is discussed and developed in each of the National Reports on this topic. The categories of prescriptive and adjudicative jurisdiction of this general system are:

#### 1. Territorial jurisdiction including

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<sup>14</sup> Accountability/Guidance (2016) Policy Objective 9.

<sup>15</sup> See Ruggie Principles (2011) esp. Operational Principles 27-31.

- a. Subjective territoriality, based on acts in the state claiming jurisdiction,
  - b. Objective territoriality, based on criminal results in the state, even if the acts occurred elsewhere), and
  - c. Ubiquity, based in either of the former;
2. Nationality (or active personality) jurisdiction, based on association of the actor with the state;
  3. Protective jurisdiction, available only for certain crimes against the vital interests of state, no matter where committed or by whom;
  4. Passive personality jurisdiction, based on the nationality of the victim (formerly controversial; now accepted at least for crimes committed against a person because of the person's nationality and terrorist crimes; used more generally in many civil law states); and,
  5. Universal jurisdiction, based on the nature of the crime as one of great international concern (now accepted for piracy and the core international crimes of genocide, crimes against humanity, and war crimes, as well as torture; in the absence of treaty authorization, it is controversial at best for crimes which violate other human rights and for other crimes).

The National Reports also include discussion of a sixth base of jurisdiction, the representation principle or vicarious jurisdiction, also called subsidiary universal jurisdiction. This principle allows a state to exercise adjudicative jurisdiction over a crime using their own law if a non-national suspected of a crime committed elsewhere is found on its territory, but for some reason the person is not or cannot be extradited to a state with jurisdiction on one of the first four standard bases. This is generally a civil law form of jurisdiction, but has been accepted by other states in treaties defining certain crimes, including crimes involving human rights, in the form called '*aut dedere aut judicare* (extradite or try) jurisdiction'.<sup>16</sup>

### 2.3 Obstacles to reparations in the international criminal courts and tribunals because of limitations of authority over subject matter and persons and limitation of resources

The first of the modern international criminal courts and tribunals were the UN Security Council-created *Yugoslav* (1993) and *Rwanda* (1994) Tribunals. They addressed the so-called 'core' international crimes of genocide, war crimes, and crimes against humanity. Concerning restitution, they began solely with authority to restore property wrongfully taken: 'the Trial Chambers may order the return of any property and proceeds acquired by

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<sup>16</sup> Eg UN Convention against Torture (1984) art 5(2).

criminal conduct, including by means of duress, to their rightful owners'.<sup>17</sup> Assistance with return of property was not explicitly required of states.<sup>18</sup>

The *Rome Statute of the International Criminal Court* (1998/eff. 2002) has a much wider-ranging scheme for reparations:

The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.<sup>19</sup>

It may also order payment out of a Trust Fund for victims and their families. This fund may receive forfeited property and other assets from convicted persons and voluntary contributions from states and individuals. Finally, states parties to the ICC Statute are required to assist in:

The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of *bona fide* third parties . . .<sup>20</sup>

The ICC Statute also provides for a mechanism to get property or its proceeds transferred from the seizing state to the Court.<sup>21</sup> The *Bemba case*, currently in the reparations phase, may yet produce some restitution or reparation for victims.<sup>22</sup>

These International Criminal Courts and Tribunals (ICCTs) limit their personal jurisdiction to natural persons, and exclude the possibility of charging corporations and other legal persons with crimes. Personal jurisdiction is usually conceptualized as an aspect of jurisdiction to adjudicate cases. However, in these courts, one might say that the lawmaking authorities have abdicated from the prescription of criminal law over corporations.<sup>23</sup>

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<sup>17</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia (1993) art 24(3) (ICTY Statute); accord, Statute of the International Criminal Tribunal for Rwanda (1994) art 23(3) (ICTR Statute). The Statute of the Special Court for Sierra Leone (2000) art 19(3) expanded the definition of what may be restored: the Court 'may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.' Yet Charles Taylor, who was convicted of being an accessory to war crimes by selling weapons into the civil war in Sierra Leone, knowing they would be used for committing those crimes, was not ordered to forfeit the 'blood diamonds' that he received in payment or their proceeds.

<sup>18</sup> ICTY Statute, art 29; ICTR Statute, art 28.

<sup>19</sup> Rome Statute of the International Criminal Court (1998) arts 74(2), 75-76, 79, 93(1)(k) (ICC Statute).

<sup>20</sup> ICC Statute art 93(1)(k).

<sup>21</sup> ICC Statute art 109.

<sup>22</sup> *Prosecutor v Bemba*, Sentencing Judgment, ICC 01/05-01/08 (2016) paras 82-84.

<sup>23</sup> That is, the UN Security Council (in the cases of the *ad hoc* Tribunals) and the states which adopted the ICC Statute (in the case of the ICC) chose not to define criminal law which the courts being created could apply to corporations. (This Report does not address the relationship between the international community as a whole as defining customary international criminal law on the one hand, and the Security Council or the group of states adopting the ICC Statute as defining law in the respective courts on the other. This is a major issue which can be explored elsewhere).

There are three problems with the reparative system of ICCTs. First, the amounts collected from convicted persons have never been enough to come close to full restitution or compensation for the victims of mass atrocity. Most of those convicted of mass atrocity have not had resources for compensation.

Second, most violations of 'international human rights law' do not fall within the mandate of these international criminal courts and tribunals, but are covered by various treaties or are coming to be recognized in other sources of international law. The crimes covered by the ICCTs are generally conceptualized as violations of 'international humanitarian law',<sup>24</sup> the law of armed conflict. International human rights law is a law covering human rights during peacetime.

Third, many violations of human rights (broadly defined), including unfair treatment of workers or environmental degradation, involve economic activity of multinational enterprises, whose wealth is seldom held by a single individual. These enterprises often benefit from such violations. As a result, many have turned to corporations and other business entities which participate in human rights violation as a just, and more likely, source of reparations for victims.

#### 2.4 The *Ruggie Principles* and reparations

The *Ruggie Principles* are designed to fill the gaps identified at the end of the previous section. The *Ruggie Principles* recommend corporate responsibility to remedy any human rights violations which occur. In particular, the principles require both that states make judicial remedies available for victims of human rights violations, and that states and businesses provide non-judicial avenues for remediation as well.<sup>25</sup>

One can see this responsibility to remedy as arising naturally out of the 2005 Basic Principles on reparations. Perhaps the big difference here is that the *Ruggie Principles* do not require 'gross' violations.<sup>26</sup> The nature of many human rights and international humanitarian law violations, then and now, suggest that corporations are, or ought to be, responsible for them in appropriate situations, even if only a few individuals are affected. Indeed, the systematic approach of the *Ruggie Principles* aims to prevent human rights violations through local action, and if that is not possible, to remedy them quickly, before they become widespread.

The *Ruggie Principles* do not directly speak to whether or not the judicial remedies for human rights violations should include criminal penalties for corporate entities. This is not surprising given that the Principles seek participation from states which have very different attitudes towards applying criminal sanctions to legal persons. This recognition of different legal systems is consistent with the modern treaty approach to requiring corporate liability

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<sup>24</sup> See, eg, the Preambles to the Statutes of the ICTY, ICTR, & ICC.

<sup>25</sup> Ruggie Principles (2011) parts II (principles 11 & 22) & III.

<sup>26</sup> This Report does not address the emphasis of the Ruggie Principles on prevention and deterrence of violations.

for treaty violations, but allowing the liability to take a form, administrative, civil, or criminal, consistent with the legal principles of each country which is party to the treaty.<sup>27</sup>

The discussion in this Report focuses on jurisdictional issues arising in criminal cases. It will raise the question whether addressing human rights violations non-criminally might ameliorate some jurisdictional problems.

## 2.5 Multinational enterprises and human rights violations: a scenario

The organization of business enterprises for purposes of operating across borders is varied. It is not possible even to specify all of the possible options. For purposes of simplicity, this Report will discuss a common scenario: A multinational business, corporation A, is legally organized and headquartered in state A (often referred to in the literature as the 'home state' of the multinational enterprise). For a combination of business and legal reasons, it forms a subsidiary, corporation B, legally organized, headquartered, and doing substantially all its business in state B. Corporation B's activities are basically controlled by corporation A. The shareholders of corporation B are corporation A and some local investors who are nationals of state B. Much of corporation B's profits are repatriated to state A, and some of corporation B's assets are held in state C.

In this imperfect world, one can imagine that the operations of corporation B cause violations of human rights of persons in state B. These violations might include poisoning the water in a town where corporation B has a factory, employing slave labor, killing the publishers of a newspaper opposing the activities of corporations A and B, allowing its facilities to be used for torture of political opponents of the governments of A and/or B, selling guns to militias who will use them to massacre civilians, and committing any other sort of evil that might be considered a violation of human rights (broadly construed). This list of examples was drawn up to include violations committed at the behest of the state as well as by the corporation alone; violations of rules which are part of international humanitarian law (the law of armed conflict) and of general human rights law; violations of individual civil liberties and of what are sometimes called collective rights (e.g., to a healthy environment).

One can also imagine different levels of participation of corporation A in the crimes: its high officers or low-level employees may have: directed and/or participated in the violations, expressly condoned the violations, known of the violations and tacitly condoned them, known of the violations but did nothing, suspected the violations without investigating to find out more, knew nothing but should have known about the violations, etc. Corporation A's personnel may have directed corporation B's personnel to maximize profits at all costs, may have demonstrated that sort of attitude without directly saying so, may have refused or failed to set up the factory to operate safely or to train corporation B's personnel, may have given no direction on these issues, or may have encouraged safe practices. Corporation B's personnel may have actively and voluntarily participated in the abuses, or objected to

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<sup>27</sup> See UN International Convention on the Suppression of the Financing of Terrorism (1999) art 5 (liability may be criminal, civil or administrative); UN Convention against Transnational Organized Crime (2000) art 10 (similar); UN Convention against Corruption (2003) art 26 (similar).

them, or may have blown the whistle on them. These levels of participation in human rights violations were chosen to illustrate the various ways of attributing individual conduct to corporations shown in the National Reports.

### **3 International law jurisdictional issues concerning reparations for corporate crimes: The traditional rules**

As we have said, the legal remediation of a wrong by transnational corporate actors depends on all three aspects of legal power: prescription, adjudication, and enforcement. The National Reporters have said a great deal about jurisdiction over corporations for international crimes, both in their own countries and comparatively. This Report will focus on specific jurisdictional issues which must be faced if reparation for transnational wrongdoing concerning human rights treaty crimes and core international crimes is to be a realistic objective of corporate criminal liability.

When we talk about traditional rules of jurisdiction, we are discussing law which developed over centuries, taking its present form largely in the nineteenth and early twentieth centuries. Criminalization of corporate activities is in general a more recent phenomenon. Even today there are many states which, as a matter of principle, do not hold corporations criminally liable for their wrongs.

By the third quarter of the twentieth century many states, at least in the common law world, had introduced the concept of corporate criminal liability through statute or caselaw. Roughly by the beginning of the twenty-first century, treaties requiring states to criminalize certain activities also began to require that corporations and other legal or artificial persons be held accountable for the same set of acts either criminally, civilly, or administratively.<sup>28</sup>

#### **3.1 Corporate crime and substantive criminal law related to jurisdiction**

The National Reporters have shown that two sets of general principles of substantive law are important to understanding when jurisdiction to prescribe can really be effective. One is the substantive criminal law rules on accomplice liability and related doctrines concerning when a person is criminally liable for the acts of another. The other is the doctrine, originating in non-criminal law, of when a corporation (or other natural or artificial person) can be liable for acts of an agent or another person with a relationship to it. Depending on the law of a state, either or both of these may be vital to determining whether and when a parent corporation can be prosecuted for overseas acts of its subsidiary or other related person or entity.<sup>29</sup>

There are also some important doctrines which are specific to corporate responsibility. Some National Reports also show specific national law limits on corporate criminal liability. Some

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<sup>28</sup> Eg, UN Convention against Corruption (2004) art. 26(2).

<sup>29</sup> See Austria Report sec. 1 (last three paragraphs of Introduction, on how principles of liability for acts of others have special characteristics in context of corporate parents and subsidiaries); Finland Report sec. 2.1.1 (showing relevance of Finland Criminal Code chap. 1, sec. 10(3) on complicity liability of corporations); Italy Report, sec. 1.1 ('Doctrinal basis' portion on 'failing to prevent' crime as basis for liability); Switzerland Report, sec. 2.1.2 (setting out a complex set of requirements for corporate liability).

states limit this liability to certain offenses.<sup>30</sup> Some states subject corporations only to civil or administrative liability. Some national law shows that who is involved in a corporate decision is vital to determining corporate liability.<sup>31</sup>

Any of these national rules of law may, in the context of the law of a given state, limit reparative responsibility on the parent corporation through the criminal law. As the Australia National Report says, corporate crime rules may contain ‘specific departures from the general liability rules . . .’.<sup>32</sup> This Report will discuss these doctrines of substantive criminal law to the extent necessary to show the relationship of a decision to exercise jurisdiction (of any kind) over the parent company to the ability to repair the wrong done.

### 3.2 Prescriptive jurisdiction over crime by corporations

Creation of a law of corporate crime requires authority in an entity – whether a state or a transnational or global entity – to make law which regulates or forbids certain conduct by the corporation or those acting for it.<sup>33</sup> To satisfy the principle of legality, that authority must have been exercised in advance of the conduct in question. That is, there must have been an exercise of legislative jurisdiction applicable to the specific event and the individual or legal entity accused. The exercise of legislative jurisdiction must also authorize penalties which either explicitly or implicitly provide for the possibility of reparative sanctions.<sup>34</sup>

In general, international law permits states to exercise prescriptive jurisdiction over corporations, including the authority to make them liable for crimes. There are, however, a few more issues concerning this authority than there are in the case of crime by natural persons. The most important of them involve the ability of a state to legislate for an enterprise which is in legal terms divided into several artificial persons, such as a corporate parent, subsidiaries or otherwise controlled entities, and/or partners in a joint venture.

Under international law, a state has prescriptive jurisdiction over corporations and other artificial legal entities that have been created under its law. It also has prescriptive jurisdiction over a corporation if the state is its ‘principal place of business’, its ‘head office’, or its ‘*siège sociale*’ (depending on the legal conception used by the particular state involved),

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<sup>30</sup> Australia Report, sec. 3 (on covered core and treaty crimes); Italy Report sec. 1.1 (‘Scope of corporate liability’ subsection on treaty rather than core crimes being covered).

<sup>31</sup> Finland Report, sec. 1.1.1 (only acts of certain persons within the corporation invoke corporate responsibility); Italy Report, sec. 1.1 (‘Doctrinal basis’ portion on who may cause corporation to be liable).

<sup>32</sup> Australia National Report, sec. 2.

<sup>33</sup> The notion of a ‘transnational or global entity’ includes the community of states and other actors who contribute the construction of customary international law and general principles of law. Cf, eg, International Covenant on Civil and Political Rights [ICCPR] (1966) art 15(2) (general principles of law as a source of international criminal law).

<sup>34</sup> See, eg, ICCPR (1966) art 15(1); European Convention on Human Rights and Fundamental Freedoms (1950) art 7 (ECHR); American Convention on Human Rights (1967) arts 7-9; African Charter of Human and Peoples Rights (1981) art 7(2); [Revised] Arab Charter on Human Rights (2004) art 15. See Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge Univ Press 2009) Ch 7 (for legality as a matter of customary international law, and perhaps *jus cogens*), conclusion (for relationship of legality to jurisdiction); Per Ole Tråskman, ‘Should We Take the Requirement of Double Criminality Seriously?’ in Nils Jareborg, *Double Criminality* (Iustus Förlag 1989) 135, 149ff (for relationship of legality to jurisdiction).

at least as to the corporation's dealings with third parties. This 'national character' authority over corporations is the companion of nationality jurisdiction over natural persons.

A few states claim jurisdiction over business enterprises as though they were artificial persons even when, under national law, the enterprises do not qualify as true artificial persons.<sup>35</sup> It is not clear whether any transnational entities have been branded as artificial persons with the national character of one particular state under any of these laws. An effort to do so might raise interesting problems but they will not be explored here.

A state has prescriptive jurisdiction over a corporation's territorial acts. A state has prescriptive jurisdiction over a corporation whose outside acts cause criminal results on its territory, at least when the results are direct, substantial, and foreseeable.<sup>36</sup> These are analogues of subjective and objective territorial jurisdiction (which together make up the doctrine of ubiquity) over natural persons.

There is controversy around the exact parameters of the principles applied to corporations. Naturally, a major issue arises over whether and when an action by persons associated with the parent corporation on the territory of the parent's home state may be said to have 'caused' a criminal result occurring in the host state. For the moment though, this description of the principles is sufficient.

A state need not admit a foreign corporation to do business on its territory. It may require that a foreign corporation or business enterprise which wishes to operate on its territory meet certain conditions. Commonly, the foreign corporation must form a local subsidiary. This subsidiary is usually an artificial or legal person under the law where it is formed. There may also be local ownership requirements for the subsidiary. These requirements may be seen as having two justifications. One is to clearly subject the actions of the multinational enterprise in the state to the law of the state by ensuring that there is an entity in the state which can be held responsible. The other is to ensure that a share of the profits of the actions of the enterprise inure to persons in the state. For the purposes of this Report, the first justification is key. (Even where these requirements do not exist, multinational enterprises may wish to create local or regional subsidiaries and to have local investors. These will often be vital to understanding local, national, and regional business and consumer culture.)

The local subsidiary is responsible to the law of its state. There can be no doubt about this. The local subsidiary is usually the means by which the multinational enterprise acts there. Depending on the local law, this state may also be required to own the assets used for these activities. If there is no such requirement of ownership, the enterprise may use assets owned

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<sup>35</sup> See Netherlands Penal Code art 51(3) (for the purpose of criminal law, 'equal status as a legal person applies to a company without legal personality, a partnership, a firm of ship owners, and a separate capital sum assembled for a special purpose'); Italy Report, sec 1.1, discussing Italy Legislative Decree 8 June 2001, no 231, sec 1.

<sup>36</sup> See, eg, EC *Wood Pulp Cases (A. Ahlström Osakeyhtiö v European Commission)*, Common Mkt Rep (CCH) 1 14,491 (Ct of Justice of the European Community, 1988); 15 USC sec 6A (US Foreign Trade Antitrust Improvements Act); US *Hartford Fire Ins Co v California*, 509 US 764, 766 (1994) ('substantial and intended'). These are competition cases and statutes, not human rights matters.

by a different entity incorporated elsewhere. This, as we will see, may make it more difficult to obtain a remedy for wrongs committed in the state.

### *3.2.1 Separate personhood of parent and subsidiary corporations*

International law recognizes a subsidiary corporation created pursuant to a state's law as a legal person separate from a parent corporation created pursuant to a different state's law. This is true even if the parent corporation is the sole owner of the shares of the subsidiary. In general, international law recognizes a corporation created pursuant to a state's law as a legal or artificial person separate from its owners from other states, regardless of whether those owners are natural persons or legal persons.<sup>37</sup> National law usually recognizes the separate personhood of corporations and their owners, regardless of the nationality of either.

This has consequences for the international law of prescriptive and adjudicative jurisdiction over corporations. The consequences can be outlined in the example above in section I(E): State A is the 'home state' of a corporation A which does business transnationally. State B is the 'host state' of some of corporation A's business interests. These interests all involve property owned by and activities of corporation B, a subsidiary of corporation A. Corporation B, though, is organized under the laws of state B.

In the jurisdictional tradition, state A clearly has jurisdiction to prescribe law for the territorial activities of corporation A through territorial jurisdiction. It also has jurisdiction to prescribe law for the extraterritorial activities of corporation A, as the corporation has state A's national character. However, corporation B has the national character of state B. Therefore, state A cannot simply exercise jurisdiction to prescribe law for the activities of corporation B. Those activities are not carried out on the territory of state A, nor are they carried out by a national of state A. This is the reason that the separation of legal persons is so important to issues of protecting natural persons from human rights violations.

The core international crimes are generally accepted as being subject to universal jurisdiction. That is, any state may prosecute genocide, crimes against humanity, and war crimes, no matter where the crimes were committed, who allegedly committed them, and who the victims were. Torture is likely in this group as well,<sup>38</sup> as are slavery and slave trading. Piracy is the original universal jurisdiction crime, though it is not historically treated as a human rights issue.

Other crimes which are recognized (or are coming to be recognized) in international law as human rights violations and which may be committed by business entities are systematic, gross violations of fair labor standards or degradation of the environment at and around a factory. These are not yet recognized by customary international law as giving rise to universal criminal jurisdiction. As a result, these crimes are limited to the forms of jurisdiction authorized in the relevant treaties or in customary international law, particularly territorial and nationality jurisdiction.

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<sup>37</sup> See ICJ Barcelona Traction (Belgium v Spain), [1970] ICJ Rep 3.

<sup>38</sup> See Case concerning obligation to Extradite or Try (Belgium v Senegal) [2012] ICJ Rep 422.

The questions, then, are as follows: To what extent may a state with prescriptive jurisdiction over the parent corporation also exercise such jurisdiction over a subsidiary or other entity associated to the parent formed and operated in another state? To what extent may a state with prescriptive jurisdiction over a subsidiary or other associated entity exercise such jurisdiction over the parent corporation? One way the debate is framed is whether to treat an entire commercial enterprise as a single unit. As *F.A. Mann* pointed out over thirty years ago, this is desirable in principle, but not always achievable given the current state of international and national law, because the legal persons making up the enterprise are treated as separate.<sup>39</sup>

### 3.2.2 *Application of traditional rules: objective territoriality*

One can see from these principles that it is possible for both the home states of multinational businesses and the host states of their subsidiaries, branches, or other related entities to use criminal law as a tool against international human rights and international humanitarian law violations. In the example from section 1.5 above, the home state of corporation A, state A, may legislate to prohibit acts of the corporation which cause violations of human rights, even if those violations occur elsewhere, in state B (subjective territorial jurisdiction over the corporation. State A has authority to make such laws, even if the acts of its agents which caused the violations were performed in state B – or indeed anywhere else (jurisdiction over a corporation with its national character).

State B has jurisdiction to legislate over acts of corporation B, a subsidiary of corporation A, which cause harm in its own territory. If the acts occurred in state B, there is subjective and objective territorial jurisdiction; if they occurred elsewhere, there is objective territorial jurisdiction; in either case, there is also jurisdiction over the corporation with the national character of state B.

State B may also have jurisdiction to legislate for corporation A as well. If acts of corporation A are committed on the territory of state B, as where it has a branch office, jurisdictional authority is clear. Even if no acts of corporation A have been committed on the territory of state B, there may still be legislative jurisdiction if the acts resulted in human rights violations in state B, on the basis of objective territoriality. We see from the National Reports that objective territoriality is widely practiced. There are very few states which reject it, and they generally do not appear to object diplomatically when other states use it. New developments, discussed in part IV, have only strengthen the position that a state has prescriptive jurisdiction over a corporation whose acts abroad cause a crime in the prosecuting state.

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<sup>39</sup> See *FA Mann, The Doctrine of International Jurisdiction Reconsidered after Twenty Years*, *Recueil des cours* vol 186, pp 1, 54 (1984). For an example of national law which does not allow for prosecution of the entire enterprise or concern, see *Austria Report* sec. 2.1.1.a.

### 3.2.3 *Criminal responsibility of individuals not impaired by corporate criminal liability*

In most states, one is criminally responsible for one's own acts, even if they were done on behalf of a corporation. Corporate criminal liability does not remove individual liability, either traditionally or today.<sup>40</sup>

A state has jurisdiction to make law for its individual nationals who are outside its borders, as well as for territorial acts. For example, in the scenario described in section 1.5 above, assume that a Director of subsidiary corporation B, who works in state B, is also a national of state A. State A may exercise prescriptive jurisdiction for the Director on the basis of nationality jurisdiction. State B may exercise prescriptive jurisdiction over the Director on the basis of territorial jurisdiction. As a result, if the Director orders, participates in, or abets a crime in state B, the Director may be criminally responsible to either state, if the national law of each state makes her so.<sup>41</sup>

### 3.3 Adjudicative jurisdiction: Trial and sanctions

In terms of adjudicative jurisdiction, there must be a court or similar entity with authority to adjudicate the charge and to impose a judgment with a reparative element. In general, for criminal law, adjudicative and prescriptive jurisdiction are the same. This follows from the principle that a state will only apply its own criminal law in its courts. Thus, if it cannot adjudicate cases over which it has prescriptive jurisdiction, it is effectively deprived of some authority to define crime. Corporate criminal liability raises new problems of adjudicative jurisdiction.

First, the international law of adjudicative jurisdiction over businesses includes at least one limitation from the law of corporate personhood. State law must recognize that when a transnational enterprise has created incorporated units in different states (whether or not the units are parent and subsidiary or subsidiaries), the units are different legal persons, with different national characters. The legal separation is normally true under national law if the units are incorporated in the same state. In a single state, however, that state may change this doctrine of corporate law. It may ignore the distinction if it wishes (it may 'pierce the corporate veil') for many purposes, including protection of victims of law violations. In the multinational situation, however, the distinction of corporations as persons with distinct nationalities may not be overridden simply by national fiat.<sup>42</sup> This enforced separation of artificial persons has been critical to shaping the substantive law of corporate human rights crime.

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<sup>40</sup> See generally Charles Doyle, *Corporate Criminal Liability: An Overview of Federal Law*, (US Congressional Research Paper 2013) 5.

<sup>41</sup> A few states, especially the United States and United Kingdom, have attempted to take the idea of a 'national person' further, especially in corruption cases. The United States has attempted to maintain the national character of exported goods and technology (eg in the Siberian Pipeline conflict of the 1980s and the more recent enforcement of an embargo on nuclear technology going to Iran). This Report does not deal with these issues.

<sup>42</sup> See ICJ *Barcelona Traction* (1970).

Specifically, separation of artificial persons created by different states in international law limits penalties against business enterprises. The state of incorporation has exclusive jurisdiction over matters of existence and dissolution of an entity incorporated there. As a result, options for sanctions on corporations involving their existence or internal organization may not be available to states other than the state of the incorporation. Another state, either where the corporation acted or where its acts caused criminal results, may have sanctions involving loss of the right to do business in the state – but cannot dissolve the corporation.

Second, many states include limitations on the amount of monetary sanctions in their schemes for exercising adjudicative jurisdiction over corporations. These sanctions, while substantial, may be inadequate for remedying major wrongs implicating human rights.<sup>43</sup>

Third, many states still apply criminal law only to natural persons. In such states, remedies against corporations and legal persons for human rights abuses will be either civil or administrative. The Germany and Italy Reports present good examples of law for corporate administrative liability for what would otherwise be criminal actions. Each of those states has committed its law to addressing the problem of transnational corporate crime in the human rights context, but each of them applies non-criminal or quasi-criminal administrative sanctions to corporations, instead of true criminal law.

Fourth, countries vary greatly in their treatment of victims in criminal cases. In some civil law countries, such as France, a crime victim can become a civil party to the action and obtain a reparative judgment against a criminal, which for some purposes may be treated as a civil judgment.<sup>44</sup> In most common law countries, a criminal case is between the state as prosecutor and the defendant. Criminal penalties in some countries may include orders of restitution or other remedy from the defendant to the victim. There are many varieties of these systems. All of these systems are acceptable in customary international law. However, as we will see, they may have different consequences for enforceability of remedies for transnational crimes.

Fifth, where a state attempts to prosecute a foreign corporation on the basis of objective territorial jurisdiction, it may have trouble bringing the corporation into court. Unlike individuals, corporations cannot be ‘extradited’ from one state to another. The situation is most likely to arise where corporation A, with the national character of state A, allegedly commits an act in state A which causes a criminal result in state B. Assume that state A does not technically ‘do business’ in state B, and thus has not registered there or submitted itself to jurisdiction of B’s courts. It will be very difficult to force corporation A into the courts of state B to answer the charge. Some states exercise adjudicative jurisdiction in absentia in criminal cases. Any judgment on such a basis, however, may not be recognized by other states for that reason. Because states only enforce their own criminal laws, state B cannot do

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<sup>43</sup> See eg, Finland Report sec 1.1.1 (850,000 Euros maximum); Switzerland Report sec 1.1.3 (maximum fine CHF 5,000,000, but describing at least one negotiated settlement beyond this amount, with CHF 36,400,000 going for ‘compensation to victims’); see Zerk Report (2014) 85-87.

<sup>44</sup> See Zerk Report (2014) 77 and *passim*.

in this criminal case what a private plaintiff could do in a civil case: go into the courts of state A to bring corporation A to book there.

### 3.4 Enforcement jurisdiction

Through and through, the *Ruggie Principles* aim at voluntary, systematic, proactive human rights monitoring and compliance by business entities. However, they recognize that such compliance depends, in large part, on the existence of hard law and state-based legal mechanisms for enforcing compliance.<sup>45</sup> The 2016 Accountability/Guidance is aimed specifically at state entities.<sup>46</sup> Yet enforcement authority may present the greatest challenge to achieving reparation through corporate criminal liability.

First, enforcement jurisdiction – including the authority to seize property – is entirely territorial, whether the matter is civil, administrative, or criminal. It may not be exercised on the territory of another state without permission. This is a rule of public international law that all states recognize. The state in which corporate assets are held thus has power over the enforcement of judgments against the property, even if it is not the state of the corporation's national character or the state where the corporation acted or caused harm.

Second, traditionally states will not enforce the penal law or penal judgments of other states.<sup>47</sup> This rule is generally followed by states under their own laws, but it is not compelled by public international law.<sup>48</sup> States may need to adjust national law concerning recognition of penal judgments to make criminal jurisdiction over corporations a useful tool for promoting human rights reparations. Both bilateral and multilateral treaty-making may help make this adjustment possible.

Where these traditional rules apply, a state in which persons have been injured by a multinational business' crime may find itself in an awkward position. The state may be able to charge and convict the local subsidiary of the crime. The sentence may include forfeiture of profits gained through the crime and fines for other compensation. Yet the state may find that it cannot seize the property required for reparations because it is held elsewhere or may be owned by another legal entity of the enterprise. In our example from section 1.5, assume corporation B in host state B has most of its assets held in state C. Assume the corporation has been criminally convicted in state B with a penalty of forfeiture of assets for reparations purposes. Assume also that the corporate assets held in state B are insufficient to meet the

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<sup>45</sup> See Ruggie Principles (2011) principles 25, 26 (court and non-court state remedies for human rights violations by business). The Ruggie Principles are designed to produce exemplars of rule of law as set forth by H.L.A. Hart, *The Concept of Law* (3<sup>rd</sup> ed, 2012; orig 1961): general voluntary compliance with mandatory rules, backed up by unbiased judgment and enforcement power.

<sup>46</sup> Accountability/Guidance (2016) para 19.

<sup>47</sup> See M Cherif Bassiouni, 'Introduction to Recognition of Foreign Penal Judgments,' in M Cherif Bassiouni, ed, *International Criminal Law*, vol. II (*Multilateral and Bilateral Enforcement*) (3<sup>rd</sup> ed, 2008) 507, going back to US *The Antelope*, 23 US 66 (1825) ('The courts of no country execute the penal laws of another . . .').

<sup>48</sup> See Ralf Michaels 'Recognition and Enforcement of Foreign Judgments' in Max Planck Encyclopedia of Public International Law (2009) <[www.mpepil.com](http://www.mpepil.com)>.

reparation requirement. Under the traditional rules, state C would not execute the criminal judgment by seizing corporation B's assets there.

Where the traditional rules apply, legal characterization of a matter in the adjudicating state may also make a great difference to foreign enforceability. Given a state in which a victim of human rights violations brings a civil case against a corporation, other states will recognize and enforce a money judgment from that case on the same basis as other civil money judgments. A similar result may occur given a state in which victims are 'civil parties' in proceedings connected to criminal prosecutions.<sup>49</sup> In states where judgments in criminal cases are characterized as wholly criminal, such foreign enforceability will not be directly available without modification of national law.

Conversely, a prosecution may be against the parent corporation in its home state, for crimes committed elsewhere in the world by it or its subsidiaries at its direction or with its complicity. Devising a remedy which restores the injured persons and communities may require a highly place- and context- specific negotiation in the place where the injury occurred. It may also require a complex scheme of implementation (for example, environmental restoration). Under the traditional rules, neither of these can be done on the territory of victims' state as part of the criminal matter without permission of the state. Such schemes of implementation may often need some form of regulatory approval by the host state, no matter the form of the judgment as civil or criminal.

Executing judgments for restitution and reparation for human rights violations by corporation may sometimes be easier if the judgment is civil rather than criminal. It should not be assumed that judgments against multinational parent corporations will always come from courts in states where the corporation has a great deal of assets, nor that they will always make payments voluntarily.

So long as a foreign judgment can fairly be called both civil in form and purely compensatory to victims (i.e., the judgment does not contain sums denoted or obviously intended as punishments unconnected to reparations), states will usually apply their private international law rules on recognition and enforcement of foreign judgments.<sup>50</sup>

That a case involves violation of human rights should not be a negative factor in determining whether to enforce a judgment. States should not reject foreign judgments for violations of human rights on the ground that they are based on advancing a state interest of the issuing state.<sup>51</sup> In these cases, human rights are interests of all states, and therefore should be treated

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<sup>49</sup> Cf. Treaty between Great Britain and France, Reciprocal Enforcement of Judgements (1934) art. 2(2); EU Regulation No. 2015/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2012) ('Recast Brussels I') arts 2(a), 7(3), 39, 45, 46; ECJ Case C-52314, *Aannemingsbedrijf Aertssen NV v VSB Machineverhuur BV*, ECJ (3<sup>rd</sup> Chamber), paras 31-36 (2015)..

<sup>50</sup> See generally Ralf Michaels, 'Recognition and Enforcement of Foreign Judgments' in *Max Planck Encyclopedia of Public International Law* (2009) <[www.mpepil.com](http://www.mpepil.com)>.

<sup>51</sup> Some states may treat administrative orders or judgments of other states as unenforceable because they promote the governmental interest or public law of the issuing state. Cf. Michaels (2009) para 3; Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (2012) art 1(1). This issue will not be addressed in this paper, except to point out progress made by treaty in

across borders at least as respectfully as any other judgment of the rendering state would be treated in private international law.

## 4 Responding to problems of restitution and reparations caused by international law

### 4.1 Substantive law doctrines on liability of corporations for their own acts and for acts of subsidiaries or parents

The separate personhood of parent and subsidiary corporations creates difficulties in remedying human rights violations by business enterprises. The home states of parent corporations need to develop rules of law to determine when the parent may become liable for acts of its foreign subsidiaries or foreign partners. Similarly, the host states of subsidiaries of foreign parents must adopt some legal mechanism for using their own law to obtain reparation for and prevent repetition of human rights abuses in the host state ordered or tolerated by the outside parent. Most commonly, states use substantive criminal law doctrines of responsibility of one person for acts of another to address the issue of separate corporate personhoods. They also use agency-type concepts to define who has acted or may act for the corporation for purposes of criminal liability.

#### 4.1.1 *Whose acts engage corporate responsibility?*

In some places, in order to engage corporate responsibility, some wrongful act must have been committed by a high official of a corporation, whether a director, officer, or similar person with responsibility for corporate policy or decision-making. As the Austria Report states, the substantive wrongful act may have been done by a lower ranking officer or employee because of a failure of a high official to take necessary measures to prevent the offense.<sup>52</sup> The idea of limiting corporate crime to those with some involvement of higher management is to make sure that attribution liability of the corporation is really fair, given the possible adverse consequences for various stakeholders, such as shareholders and workers.

The Australia Report notes that a corporation is objectively liable if the wrongful acts or omissions were committed by an employee, agent, or officer, who was acting within the actual or apparent scope of his/her employment or authority.<sup>53</sup> The United States Report notes a similar standard, and shows that *respondeat superior* – the doctrine that a principal is liable for the acts of its agent done within the scope of actual or apparent authority – is applicable in US federal criminal cases.<sup>54</sup> Corporate criminal responsibility in these two

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eliminating this obstacle to recognition and enforcement of foreign judgments. See Michaels (2009) para 16, citing Bustamante Code [Private International Law treaty] (1928) arts 423-37.

<sup>52</sup> See Austria Report, based on National Reporters' reading of statutes and doctrine.

<sup>53</sup> Australia Report sec. 3.2, citing Australia *Criminal Code 1995* (Cth), sec 12.2.

<sup>54</sup> United States Report sec 1.1.1. The Zerk Report (2014) 69 argues the definition of genocide, war crimes, and torture in US law 'seems geared toward individual defendants.' This, however, is true of the definition of most crimes and causes of action, and the rules of attribution set forth in the US Report. and the documentation in the Report demonstrate that the US Report is correct.

common law countries is, in theory, far broader than in states whose codes which limit engagement of corporate responsibility to acts by high officials of the corporation.

*Respondent superior* liability is often called ‘vicarious’ liability of the corporation, because there may have been no official act of the corporation approving what the agent has done. Because all ‘corporate acts’ are eventually the acts of individuals with separate legal personalities, however, one might reasonably call all corporate criminal liability ‘vicarious’ in one sense or another.

#### 4.1.2 *What crimes can engage corporate responsibility?*

Some states have rather broad statutes effectively making corporations liable for violating any criminal law.<sup>55</sup> Some of these states require that an act must either benefit the corporation, be done to benefit the corporation, or violate the corporation’s obligations, or any of these.<sup>56</sup>

The Australia Report notes that the national Parliament has criminalized acts constituting both core international crimes and many treaty-based human rights crimes. In principle, Australian corporations are liable for any violation of Australian criminal law. As noted above, they can be performed by any employee, agent, or officer. The Australia Report notes that Australian law has a broad provision which defines *mens rea* terms of general criminal law as being applicable to corporations. The United States Report shows similar rules.<sup>57</sup>

Some states have specific code provisions invoking corporate liability for certain crimes.<sup>58</sup> This is generally a more limited form of liability we see in the common law Reports.

#### 4.1.3 *Secondary liability and reparations*

In many cases, the liability of a parent corporation from a developed state will be as a secondary party to a crime committed by personnel of a subsidiary corporation in a developing state. The personnel of the parent corporation may also be liable individually. For this reason, doctrines of accomplice liability, conspiracy liability, and other forms of joint criminality may be important to obtaining redress from a party which bears responsibility for the crime. There is a trend to have some form of this so-called secondary responsibility in corporate criminal cases, growing out of the ideas of secondary responsibility in general criminal law.<sup>59</sup>

The secondary liability idea may be applied in situations other than the parent/subsidiary corporate relationship. The idea arose from the association of independent people acting to

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<sup>55</sup> Australia Report, Corporate Criminal Liability Rules; Austria Report, sec B.I.1.a.

<sup>56</sup> See Brazil Report sec B.I.1.a; Austria Report B.I.1.a;

<sup>57</sup> United States Report sec 1.1.1 (concerning ‘imputed intent’, the Report covers intent, knowledge, and “willful blindness” by agents, as well as conspiracies by employees, being attributed to corporations).

<sup>58</sup> See Brazil Report sec 1.1.1 (Brazil Const. arts. 173 & 225 authorize creation of crimes against economic and financial order, citizens’ monies, and the environment, whether committed by natural or legal persons).

<sup>59</sup> Zerk Report secs 2.1.2, 2.1.3 ; see also Austria Report sec. 2.1.1.a.

commit a crime. It applies to corporations which aid individuals or government agencies to commit human rights crimes.

#### 4.1.4 The 'supply chain' problem

The *Ruggie Principles* urge states and businesses to avoid human rights abuses up and down 'the supply chain' – i.e., whether or not the business entities with which they deal are either formally or substantially part of a multinational enterprise. The *KiK/Bangladesh* factory fire presents a good example of this problem. The Netherlands multinational retailer *KiK* regularly purchased clothing from a business in Bangladesh whose factory caught fire, killing over 200 employees. By any reasonable standards, the working conditions at the factory were extremely unsafe, in a way that was likely to result in such a disaster. The *Ruggie Principles* urge businesses to exercise 'human rights due diligence' concerning their suppliers, so that they can convince those suppliers to meet minimum standards, or switch to suppliers who do.<sup>60</sup> The *Ruggie Principles* are more ambivalent on whether this should be a legal requirement for businesses to comply with. The overall thrust of the 'black letter' of the principles is that it should be. However, the Commentary states:

Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.<sup>61</sup>

In traditional criminal law, there are great difficulties in demonstrating the *mens rea* of the officers or employees of the multinational corporation concerning the adverse impacts, unless one can show a conspiracy or similar arrangement by the multinational to aid and abet the violations by the local supplier. There are similar difficulties in showing legal ('proximate') causation of the adverse impacts by the multinational, because of the independent, purposeful decisions by officials of the local supplier to commit the acts leading to the adverse impacts.

Rules that would hold the multinational corporations and their officials criminally liable for acts of independent local members of the supply chain would go far towards making this group of outsiders into a 'human rights police force' in developing countries. It is not clear which, if any, such countries would welcome this legal development.

## 4.2 Jurisdiction to prescribe: Developments

The National Reports predominantly show the use of traditional bases of jurisdiction over corporations for human rights crimes. To the extent that there is expansion of jurisdiction, it is along the lines required or permitted in treaties covering crimes against international human rights or international humanitarian law. By itself, this is not surprising.

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<sup>60</sup> Ruggie Principles (2011) principles 13, 17-22.

<sup>61</sup> Ruggie Principles (2011) commentary to principle 22; see also commentaries to principles 18-21.

#### 4.2.1 *Universal jurisdiction over corporations: Criminal and civil*

Some have argued that states should be more active in asserting and exercising universal jurisdiction over acts which constitute these crimes. Universal jurisdiction to prescribe and adjudicate concerning acts which are war crimes, crimes against humanity, and genocide is well-established under international law. Torture can today be counted as a universal jurisdiction crime as well.<sup>62</sup>

The European Union *amicus brief in Kiobel*<sup>63</sup> argued that universal jurisdiction should apply in appropriate cases whether the particular case involved is criminal or civil, and the defendant in that case was a corporation, *Royal Dutch Petroleum*. However, amicus briefs in this and other cases show that Australia, the Netherlands, Switzerland, and the United Kingdom (two of which are EU members, one of which is the home state of *Royal Dutch Petroleum*) have criticized the notion of universal civil jurisdiction.<sup>64</sup> Universal civil jurisdiction to prescribe and adjudicate in these cases is not universally accepted, even if the state exercising jurisdiction will prescribe law by applying the appropriate substantive international humanitarian law or international human rights law.

Expanding universal jurisdiction, either civilly or criminally becomes even more difficult when the violations are of human rights law rather than international humanitarian law. The human rights law treaties generally do not create general universal jurisdiction over crimes. In particular, the International Bill of Rights (UDHR, ICCPR, and ICESCR) and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work<sup>65</sup> do not require criminalizing violations at all. One right listed in the ILO Declaration which probably is subject to universal jurisdiction in criminal cases is the prohibition against 'forced or compulsory labour'<sup>66</sup> – i.e., slavery.

There is no generally agreed on scheme for what acts causing adverse impacts on these rights – especially by private actors – should be treated as criminal. This issue is beyond the scope of this Report, except to note its difficulty in the absence of a treaty requiring criminalization of certain acts.

Some criminalization treaties require states to extradite persons wanted for the relevant crimes by another state, or else to refer the case for prosecution in their own courts ('extradite

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<sup>62</sup> See Questions Concerning the Obligation to Extradite or Prosecute (Belgium v Senegal), 2012 ICJ Gen. List No. 144, para. 99.

<sup>63</sup> *Kiobel*, Brief of the European Commission on behalf of the European Union (2012) 17-18, quoted and discussed in OHCHR Working Paper no 2 'State positions on the use of extraterritorial jurisdiction in cases of allegations of business involvement in severe human rights abuses: a survey of amicus curiae briefs filed by States and State agencies in ATS cases (2000-2015)' (2015) 11-12.

<sup>64</sup> OHCHR Working Paper no 2 'State positions on the use of extraterritorial jurisdiction in cases of allegations of business involvement in severe human rights abuses: a survey of amicus curiae briefs filed by States and State agencies in ATS cases (2000-2015)' (2015) 6.

<sup>65</sup> Ruggie Principles (2011) principle 12 sets these out as the foundation of international human rights law.

<sup>66</sup> International Labour Organization's Declaration on Fundamental Principles and Rights at Work (1998) para. 2(b).

or try').<sup>67</sup> This subsidiary form of universal criminal jurisdiction is generally accepted, but is not a cure for the lack of primary universal jurisdiction over human rights violations generally.

There is very little state practice applying primary universal jurisdiction to remedy international human rights law wrongs to persons outside the areas of traditional international humanitarian law and probably torture and slavery. As the United States Report shows, the courts of that country have pulled back concerning possible use of the Alien Tort Claims Act to create universal civil jurisdiction even over violations of international humanitarian law.

#### 4.2.2 *Treaties and other international or transnational documents requiring corporate accountability for acts which are crimes for individuals*

A number of treaties and other international or transnational documents require that national law hold corporations and other artificial persons liable in some way for acts which, when committed by individuals, are crimes. These treaties usually allow states to decide whether corporate liability will be criminal, administrative or civil; they may be worldwide or regional.<sup>68</sup> These requirements apply both to states which are generally 'host' states of transnational enterprises and to states which are generally 'home' states of operating entities such as subsidiaries, where many business-related human rights take place.

#### 4.2.3 *Consolidation of objective territoriality*

Objective territoriality has become even stronger as a basis for criminal jurisdiction in recent decades. This appears in most of the criminalization treaties over this period. We also see it in state business regulation practice, where a direct, substantial, reasonably foreseeable (forbidden) economic effect in a country will support prescriptive jurisdiction over anticompetitive actions committed outside the country.<sup>69</sup> This is reinforced by the non-

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<sup>67</sup> Eg, UN Convention against Torture (1984) art 5(2).

<sup>68</sup> Worldwide treaties include: UN International Convention on the Suppression of the Financing of Terrorism (1999) art. 5 (when a person responsible for management and control of the corporation does the act in his/her official capacity; only required to criminalize acts of corporations located in the state party or organized under its laws; liability may be criminal, civil or administrative); UN Convention against Transnational Organized Crime (2000) art 10 (location of corporations which must be held liable not specified; liability may be criminal, civil, or administrative); UN Convention on Corruption (2003) art 26 (location of corporations which must be held liable not specified; liability may be criminal, civil, or administrative). Regional treaties include: Convention on the Protection of the Environment through Criminal Law, ETS No 172 (1998) arts 8, 9 (requiring criminal or administrative sanctions for legal persons); Additional Protocol to the SAARC Regional Convention on the Suppression of Terrorism (2004) art 6 (shall create liability of legal entities, which can be criminal, civil or administrative); CoE Convention on the Prevention of Terrorism (2005) art 10, CoETS, No 196. For non-treaty documents requiring states to create corporate liability, whether criminal or otherwise, for international crimes, see, e.g., UN Security Council Res. 1373, UN Doc. S/RES/1373 (2003) para 1(b); EU Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law (2008) art 5 ('held liable').

<sup>69</sup> See EC *Wood Pulp Cases* (1988); 15 USC sec. 6A (US Foreign Trade Antitrust Improvements Act); US *Hartford Fire* (1994) ('substantial and intended').

criminal private international law rules of many countries, which use the law of the place of the injury or harm as the law defining tort liability.

This is important for host countries of multinational businesses. It means that they have authority to make law, civil or criminal, for those multinationals which direct the activities of both artificial and natural persons within their territories. Where the actual amount of assets held by the multinational's subsidiary or branch or partner in the host state may be small, the ability to hold the parent corporation liable may significantly increase chances of real reparations.<sup>70</sup>

### 4.3 Jurisdiction to adjudicate: Developments

#### 4.3.1 *Treaty law developments*

Some of the newer treaties have requirements that victims of crimes have access to remedies for their victimization, including remedies that might be required to cross borders in order to be effective. The Convention against Corruption requires that states enforce confiscation of proceeds of corruption crimes and instrumentalities of these crimes,<sup>71</sup> and goes on to require states to take measures to ensure victims have a means for obtaining compensation<sup>72</sup> (given that full compensation may go beyond restitution of wrongfully taken property). These remedies need not always be part of the criminal matter.<sup>73</sup>

This is a rather recent development in treaty-making, and occurred over the course of making several treaties. The 2000 Convention against Organized Crime requires seizure of proceeds and instrumentalities of crime and suggests using them for compensation, including transnationally.<sup>74</sup> Its main text does not have the requirement of additional means for achieving full compensation for victims, but its Protocol on Trafficking in Women and Children does and includes a provision on rehabilitation of victims as well.<sup>75</sup>

#### 4.3.2 *Reparations and legality of punishments*

The principle of legality requires that punishments as well as forbidden acts be specified in advance of a crime. Many states consider a sentence outside that specified by statute to be an illegal sentence which can be voided, even if it was agreed to by a defendant, because it was beyond the authority or jurisdiction of the court to impose. This poses some obstacles to courts developing and applying the sort of flexible sanctions imagined by the 2005 Basic Principles and the 2011 *Ruggie Principles*, at least when the sanctions are applied in criminal cases.

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<sup>70</sup> See section 3.4 below on developments in enforcement jurisdiction.

<sup>71</sup> UN Convention against Corruption (2003) art 32.

<sup>72</sup> UN Convention against Corruption (2003) arts 35, 57(c); cf art 34 (on undoing other consequences of corruption).

<sup>73</sup> International Labour Organization's Declaration on Fundamental Principles and Rights at Work (1998) para 2(b).

<sup>74</sup> UN Convention against Transnational Organized Crime (2000) arts 12(1), 14(2).

<sup>75</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000) art. 6(3 and 6).

A statute allowing a court to determine an amount of money required for full reparation in a criminal case can certainly be written, as can a statute requiring restitution of property taken or otherwise illegally obtained, so long as it is not real property subject to the exclusive jurisdiction of another country. However, the regime suggested by the *Ruggie Principles* would allow or require remedies beyond the monetary which would require corporations and perhaps individuals convicted of crime to participate in the sorts of activities quoted above from the 2005 Basic Principles.<sup>76</sup> It may be difficult to write such statutes for criminal penalties without facing the question how flexible criminal penalties can be before they violate the principle of *lex certa*, that the law be reasonable certain (not vague) and understandable to persons.

It is possible that this issue can be addressed in the criminal context. It will, however, take a great deal of work.

#### 4.4 Enforcement jurisdiction: Developments

There are two great problems of enforcement jurisdiction concerning corporate human rights crimes. First is the requirement of permission to act on the territory where assets are held. Second is the practice of forbidding enforcement of another state's penal laws.

The 2005 UN Guiding Principles indicate that states should allow enforcement of judgments of other states which provide reparations for human rights violations:

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.<sup>77</sup>

Domestic judgments enforced domestically do not raise international law issues of jurisdiction to enforce. Nonetheless, fear of states' unwillingness to enforce their own courts' judgments against themselves or powerful business interests led to this provision. It is an echo of provisions of some human rights treaties requiring that national remedies for human rights violations be enforced, at least within the state whose judiciary gave the remedy.<sup>78</sup> Similar provisions also appear in some of the human rights treaties requiring that violations be criminalized, such as the Convention against Torture.<sup>79</sup>

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<sup>76</sup> See section 1 above, quoting UN Basic Principles (2005) paras 19-23.

<sup>77</sup> UN Basic Principles (2005) para 15.

<sup>78</sup> ICCPR (1966) art 2(3)(c) (enforcement of national judicial remedies); ACHR art 25(2)(c) (same); see ECHR (1950) art 13 (remedy must be 'effective').

<sup>79</sup> UN Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (1984) art 14(1) (compensation, including rehabilitation for torture survivors; compensation for dependents of victims killed by torture).

Some National Reports show compensation among available criminal penalties or that criminal penalties may be imposed without prejudice to repair of damages caused.<sup>80</sup>

Many reparations judgments may need to be enforced transnationally. The persons, natural or legal, against whom they are issued may not have property to seize in the jurisdiction in which the judgment is issued. When a state where a transnational enterprise is operating issues a judgment against the parent corporation from another state, it is quite likely that the judgment will need to be enforced in the state of incorporation or the state of its principal place of business or another state where it holds assets. Where necessary remedies include systematic change in the way the enterprise does business, effective orders may need to be entered in both in the host state where operations occur and the home state of the parent.

#### *4.4.1 Enforcing judgments, especially criminal judgments, across borders today*

The traditional rules continue to exist. The rule against one state acting on the territory of another without permission remains intact. The rule against enforcement of another state's criminal law and criminal judgements continues to exist as a general rule, except where modified by treaty, statute, or other law.

There has been some progress. Some treaties require states to cooperate in enforcing criminal judgments seizing or forfeiting property.<sup>81</sup> The worldwide treaties to this effect address particular crimes, rather than providing an overall framework for obtaining funds for reparations. The problems raised by judgments subjecting corporations to criminal sanctions in one country which must be enforced in a country which applies only administrative or civil sanctions to corporations remain unresolved.

The Convention against Corruption speaks most directly to both the problem not being able to act on the territory of another state and the problem of not enforcing another state's criminal laws. It has elaborate provisions for state cooperation in identifying and seizing property.<sup>82</sup> These provisions require states to conform their laws, in effect, to allow the forfeiture and seizure portions of foreign criminal judgments concerning crimes of corruption to be enforced through their legal systems.

States must make legal persons subject to 'criminal, civil or administrative' liability for participation in criminal acts under the convention.<sup>83</sup> Provisions for forfeiture or confiscation of assets which are the proceeds of criminal activity appear to require states where property is found to establish laws allowing seizures of this property without regard to whether the

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<sup>80</sup> Austria Report sec. 2.I.1.a., discussing Law on the Responsibility of Corporations ('Verbandsverantwortlichkeitsgesetz', VbVG, BGBl I 2005/151, in force since 2006) secs 4-6; cf. Brazil Report, sec. 1.1.1, citing Brazil Constitution art. 225 (stating that penalties for environmental crimes may be imposed 'without prejudice to the obligation to repair the damages caused').

<sup>81</sup> See UN Convention against Corruption (2003) arts 31, 35 (on private victims), and chap. V (on asset recovery); EU Framework Decision 2005/214/JHA on the Application of the Principle of Mutual Recognition to Financial Penalties (2005) art. 5; EU Framework Decision 2006/783/JHA on the Application of the Principle of Mutual Recognition to Confiscation Orders (2006), art. 6.

<sup>82</sup> UN Convention against Corruption (2003) pt. V, especially art 55. See also UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) (not addressing human rights issues).

<sup>83</sup> UN Convention against Corruption (2003) art 26.

property is held by a corporation or an natural person, whether the judgment being enforced is civil or criminal, or whether the state where the property is located criminalizes acts of corporations.<sup>84</sup> It requires states where assets are held 'to permit another State Party to initiate civil action in its courts' to establish its ownership of property, and to allow such a State Party to request an order against those who have 'committed offences' to pay compensation to the victim state.<sup>85</sup> It also must adopt procedures allowing its authorities to give effect to confiscation orders of another State Party.<sup>86</sup> These provisions, however, are subject to the requested state's 'domestic law' or 'domestic legal system'.<sup>87</sup> This leaves open to debate the question whether a state may refuse to enforce foreign criminal judgment provisions against corporate assets held on its territory on the grounds that its law or legal system does not recognize the concept of corporate criminality.

The 1999 Convention on the Suppression of Terrorist Financing has similar, but less detailed, provisions.<sup>88</sup> The question of enforcement of a criminal judgment against a corporation in a state which does not recognize corporate criminality is left open in this treaty as well, by language that measures shall be taken 'in accordance with its domestic legal principles'.<sup>89</sup> It is not clear at this point how well these provisions have been implemented in the national law of states in which assets are likely to be found.

The Convention against Corruption urges, but does not require, that the seized assets go to reparations to victims. States must give 'priority consideration' to returning the property to the victims of crimes of corruption who are in other states.<sup>90</sup> The Convention on the Suppression of Terrorist Financing suggests that states consider mechanisms for sharing funds with other states and compensating victims of terrorism out of seized assets.<sup>91</sup>

The EU has a more general approach. It has issued two directives on recognition throughout the EU of criminal judgments applying financial penalties and forfeitures of property.<sup>92</sup> It has also issued a directive requiring prompt return of property to victims of crime and consideration of requiring compensation of offenders, along with requiring procedures to enable victims from other EU states to make their claims in the place of prosecution.<sup>93</sup> Unfortunately, this procedural requirement does not apply to persons from outside the EU who are victims of human rights violators being prosecuted in the EU.

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<sup>84</sup> UN Convention against Corruption (2003) arts 53-55.

<sup>85</sup> UN Convention against Corruption (2003) art 53.

<sup>86</sup> UN Convention against Corruption (2003) art 54.

<sup>87</sup> UN Convention against Corruption (2003) arts 53-55.

<sup>88</sup> UN Convention on the Suppression of Terrorist Financing (1999) arts 5, 8.

<sup>89</sup> UN Convention on the Suppression of Terrorist Financing (1999) art 8.

<sup>90</sup> UN Convention against Corruption (2003) art 57(c).

<sup>91</sup> International Convention for the Suppression of the Financing of Terrorism (2000) art 8(3 and 4).

<sup>92</sup> EU Framework Decision 2005/214/JHA on the Application of the Principle of Mutual Recognition to Financial Penalties (2005) art 5; EU Framework Decision 2006/783/JHA on the Application of the Principle of Mutual Recognition to Confiscation Orders (2006) art 6.

<sup>93</sup> Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (2012) arts 15-17, implementing Treaty on the Functioning of the European Union art 82(2).

Some newer bilateral Mutual Legal Assistance Treaties (MLATs) provide for enforcement of criminal fine, forfeitures and/or restitution.<sup>94</sup> Some states have statutory provisions governing forfeiture, seizure, and confiscation as matters of mutual legal assistance either by treaty or, sometimes, without treaty based on reciprocity.<sup>95</sup>

#### 4.4.2 *Form of the judgment: criminal or civil*

The EU Recast Brussels I Regulation shows the importance of form to the exercise of enforcement jurisdiction in transnational cases. In criminal cases where the victim is treated as a civil party, a judgment in favor of the victim is treated as a trans-nationally enforceable civil judgment. This becomes clear from the definition of a 'judgment' in the Regulation,<sup>96</sup> the subsection on jurisdiction related to criminal cases,<sup>97</sup> and the rejection of jurisdiction as a 'public policy' ground for refusing recognition and enforcement of judgments.<sup>98</sup>

The Regulation does not apply to criminal judgments concerning the rights of victims who are not civil parties. It also does not apply to 'administrative matters',<sup>99</sup> thus appearing to exclude decisions from the 'criminal administrative responsibility' system described in the Italy National Report or the German 'administrative fine' system described in the Germany National Report. In any event, this Regulation applies only to recognition of judgments issued within the EU and a few associated non-member states.

In many non-EU states, the prohibition of recognition of foreign criminal judgments remains. Foreign civil money judgments may be recognized under certain conditions defined by national law.

#### 4.4.3 *Enforcement jurisdiction and non-monetary reparations*

Non-monetary judgments and orders are often difficult to enforce in other states. This is especially true in criminal cases, though it often applies in civil cases as well. For example, in the United States, statutory reform allowing courts to recognize and enforce monetary judgments from the courts of other countries does not extend to non-monetary judgments and orders.<sup>100</sup> Some states (in the international-law sense) will recognize many non-monetary civil judgments.<sup>101</sup>

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<sup>94</sup> Kevin M Stephenson, et al, *Barriers to Asset Recovery* (World Bank, 2011), appendix B, available at <http://documents.worldbank.org/curated/en/204221468338390474/pdf/632580PUB0Barr0ID0186600BOX361512B0.pdf>, contains extensive citation to these sources from a sampling of countries.

<sup>95</sup> See generally Stephenson, et al (2011), appendix B.

<sup>96</sup> EU Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Recast Brussels I) art 2(a).

<sup>97</sup> Recast Brussels I art 7(3).

<sup>98</sup> Recast Brussels I arts 45(3) 46.

<sup>99</sup> Recast Brussels I art 1(1).

<sup>100</sup> See Uniform Enforcement of Foreign Money Judgments Act (1948) (adopted in about 16 US states, written by Uniform Law Commission, an expert body appointed by the state governments to present draft statutes harmonizing law).

<sup>101</sup> Ralf Michaels 'Recognition and Enforcement of Foreign Judgments' in Max Planck Encyclopedia of Public International Law (2009) p 3, <[www.mpepil.com](http://www.mpepil.com)>.

Suppose one form of reparation awarded in the state of conviction (state A) is the requirement that corporation A rebuild schools, etc., in another country (state B) destroyed when land was confiscated. There will often be great difficulty in enforcing this sort of judgment.

Even if corporation A wishes to comply with the order, it may often need to get various permissions and licenses from state B. As a result, a judgment requiring such a remedy may need to be negotiated among state B, corporation A, and the victims of the crime in state B. It may also require the approval of the court in state A which is hearing the case.

#### 4.4.4 *Summary: Massive national reform needed for effective enforcement of reparations*

There has been some progress to overcoming problems of enforcement of judgments, whether made in civil or criminal cases, for purposes of providing reparations for corporate violations of human rights and international humanitarian law. Nonetheless, as we have seen, the traditional rules against transnational enforcement of criminal judgments and the limited nature of transnational enforcement of civil judgments still pose tremendous obstacles to effective remedies. Even in those treaties which require states to cooperate in enforcing criminal judgments, it is not completely clear what is to be done when the state doing the enforcing does not have criminal liability of corporations in its domestic law.

Given that these roadblocks are based in the traditions of national law around the world, solutions must be found in the national law of states whose people are victimized by human rights and humanitarian law violations. International consensus documents and treaties can help, but eventually, these instruments must be transferred into effective national law.

## 5 Conclusion

One cannot be too optimistic about criminal and quasi-criminal jurisdiction over corporate human rights abuses leading to a great increase in reparations to victims. In the countries covered by the National Reports, this has not happened yet.<sup>102</sup>

Today, in many cases, civil actions may be more likely to produce reparative justice for victims of transnational human rights abuses than criminal actions. In French-style civil law jurisdictions, the definition of 'civil action' may include action as a *partie civile* connected to a criminal case.

This conclusion is connected to the limitations on criminal sanctions on corporate entities – both what they are and how they can be enforced. It also suggests that the separation of corporate parent and subsidiary identity – part of international law when the two corporations have different national characters – remains an obstacle to a coherent scheme for overall enterprise liability for human rights abuses.

The *Ruggie Principles'* emphasis on voluntary monitoring and remediation of human rights abuses by corporations holds some hope. However, if it is to succeed, it must be backed up

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<sup>102</sup> Australia Report, China Report, Germany Report, Italy Report each report no cases or almost no cases being brought.

by effective legal sanctions for these abuses, as all of the United Nations documents recognize.

The voluntary monitoring and remediation scheme will work best if it is implemented at the local level, in the host states of multinational businesses. Indeed this may be the only way that it can work effectively.

New developments in jurisdictional law may prove useful here. The consolidation of objective territorial jurisdiction in new treaties against transnational crime means that host states are in a stronger position to exercise judicial authority over transnational parent corporations as well as local subsidiaries. State use of objective territoriality is permissible in customary international law, given how widespread the doctrine is in national criminal law and its long general acceptance by states. Crimes which are also human rights violations are no exception. This means that states on whose territory human rights crimes are consummated, where victimization occurs, are coming to be in a stronger position to prosecute those individuals and parent corporations which, acting outside, caused or aided the violations. Mutual Legal Assistance regimes (treaties and/or statutes) with asset forfeiture, confiscation, and recovery provisions may make criminal judgments including remedial provisions enforceable across borders.

This increased host state authority should encourage voluntary corporate compliance by entire multinational enterprises. Implementing this authority effectively will depend on capacity building efforts by host states themselves, in cooperation with developed states, international organizations, and the private and NGO sectors.

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## **NATIONAL REPORTS**



# AUSTRALIAN REPORT ON PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW

By Radha Ivory and Anna John\*

## 1 Introduction

The Commonwealth of Australia has taken an ambiguously progressive approach to the liability of corporations for international and transnational crimes. On the one hand, *Australia's Commonwealth Criminal Code* ('*Criminal Code 1995 (Cth)*' or '*Code*') has contained innovative 'holistic' rules on corporate criminal liability since it was first enacted in the mid-1990s.<sup>1</sup> The Code's general principles also clarify the basis for jurisdiction in federal criminal law. Whilst territoriality is still the default, there are four 'extended territorial' alternatives. The High Court of Australia has found two exercises of the extraterritorial legislative power constitutionally valid.<sup>2</sup> The Code has been progressively amended, moreover, to prohibit a wide range of 'core' international crimes and 'crimes of international concern'.<sup>3</sup> Some of the offences are typically committed in the context of corporate activities; others are expressly connected to 'bodies corporate'. Further reforms, contemplated for the Code and otherwise, would apply anti-corruption rules to corporate groups and modern slavery reporting requirements to supply chains.<sup>4</sup> On the other hand, the Commonwealth's jurisdiction is limited, at law, by federalism and, in practice, by the willingness of the federal executive to enforce extraterritorial standards. There is no ground in Australia for piercing the corporate veil between related companies just because a subsidiary (or 'child' company) has committed an offence. And, as Australian '*corporate social responsibility*' ('*CSR*') writers routinely recall, the Commonwealth has no comprehensive human rights act, bill, or charter.<sup>5</sup> Federal enforcers have also been subject to international pressure to increase

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<sup>1</sup> Celia Wells, *Corporate Criminal Responsibility* (OUP, 2nd edn, 2001) 156–159.

<sup>2</sup> *Polyukhovich v The Commonwealth of Australia* [1991] 175 CLR 501; *XYZ v The Commonwealth of Australia* [2006] 227 CLR 532.

<sup>3</sup> See further below Part 3.

<sup>4</sup> Attorney-General's Department (Cth), 'Exposure Draft, Crimes Legislation Amendment Bill 2017' (April 2017) and 'Combating Bribery of Foreign Public Officials: Proposed Amendments to the Foreign Bribery Offence in the Criminal Code Act 1995, Public Consultation Paper' (April 2017) both at <<https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-foreign-bribery-offence-in-the-criminal-code-act-1995.aspx>> accessed 6 September 2017; 'Modern Slavery in Supply Chains Reporting Requirement – Public Consultation Paper and Regulatory Impact Statement' (August 2017) <<https://www.ag.gov.au/Consultations/Pages/modern-slavery-in-supply-chains-reporting-requirement-public-consultation.aspx>> accessed on 7 September 2017.

<sup>5</sup> Catherine Branson, 'Business and Human Rights: The New Global Consensus?' (2014) 16 *Flinders Law Journal* 187, 198; Francine Johnson and Edward Santow, 'How Would an Australian Human Rights Act

investigation and prosecution rates for corporate foreign bribery. Local media organisations report, with apparent regularity, on the exposure of Australian firms including but not only in the ‘high-risk’ mining and extractives sectors.

Through a survey of key legislation, case law, and literature, this chapter describes and analyses the Australian approach to prosecuting corporations for international and transnational crimes. It has been prepared according to the questionnaire distributed by the General Reporter for Section 7 of the XXth World Congress of the *International Association of Penal Law* (‘AIDP’). As such, it is limited to consideration of violations committed outside the territorial jurisdiction of Australia and does not consider the adequacy of corporate civil or criminal sanctions. The chapter also proceeds on the basis that the prohibition and enforcement of international and transnational criminal laws will simultaneously protect human rights guaranteed by international law. It does not examine those connections in detail. ‘International crimes’ are understood to be those offences for which individuals could incur criminal responsibility directly under international law; ‘transnational crimes’ are prohibited within states pursuant to a multilateral treaty, which ostensibly aims to prevent and suppress behaviour with ‘actual or potential trans-boundary effects’.<sup>6</sup>

The chapter has four sections. Part 2 sets the scene with a discussion of the key historical and legal parameters. Part 3 describes the legal framework as set forth in the *Criminal Code 1995* (*Cth*) and related legislation. As Part 4 then shows, there are particular problems that would arise if these provisions were to be mobilised to hold parent companies to account for crimes committed overseas in the context of a foreign subsidiary’s operations. Other potential avenues for redress – in civil, corporate, and administrative law, as well as in Australian human rights practice – are detailed in Part 5. The research for this work was undertaken in the latter part of 2016, and updated for major developments in April and September 2017. The chapter is current to 14 September 2017.

## 2 Background and relevant actors

Australia is a prosperous country with a problematic history from an international and transnational criminal point of view. Inhabited by its Indigenous people(s) for at least 50,000 years, the Australian mainland was only populated by Europeans in the 18th and 19th Centuries. That process of white settlement is now increasingly described in terms of

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Impact Business?’ (2010) 38 *Australian Business Law Review* 7, 7–8; Alex Newton, ‘Any Volunteers? Challenges and Opportunities for Corporations Implementing the Responsibility to Respect Human Rights’ (2013) 28 *Australian Journal of Corporate Law* 72; Justine Nolan, ‘Corporate Responsibility in Australia: Rhetoric or Reality’ (2007) 12 *Australian Journal of Human Rights* 63, 75.

<sup>6</sup> Neil Boister, ‘“Transnational Criminal Law”?’ (2003) 14 *European Journal of International Law* 953, 955, 962–964.

invasion, colonialisation, and occupation<sup>7</sup> – even genocide.<sup>8</sup> The colonies were themselves established as proto-transnational gaols to which ‘common criminals’ and political prisoners from the British Isles were transferred.<sup>9</sup> Late 19th Century gold rushes<sup>10</sup> and successive waves of post-World War II immigration saw Australia become increasingly multicultural; nonetheless, Australia maintained a racially discriminatory immigration policy (‘White Australia’) for much of the 20th Century.<sup>11</sup> Australia’s policy of indefinitely detaining particular groups of migrants ‘offshore’ has been the subject of sustained academic and media attention, as well as international criticism and litigation in state and federal courts.<sup>12</sup>

In legal terms, the Commonwealth of Australia is a federation of six states that were established from among the former colonies.<sup>13</sup> Relations between the Commonwealth and the states are regulated by the Constitution of Australia (‘Constitution’), which ‘was approved by the votes in each Australian colony and duly enacted into law by the British Parliament in 1900’.<sup>14</sup> Section 51 Constitution empowers the Commonwealth Parliament ‘to make laws for the peace, order, and good government of the Commonwealth with respect to’ thirty-nine enumerated matters (‘heads of power’ or *‘placita’*). In the event of an inconsistency between a law of a State and a law of the Commonwealth, section 109 provides that ‘the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’. Therefore, the general power of the state parliaments to legislate for the ‘peace, order and good governance’ of their polities is substantially qualified by federalism.

International and transnational criminal law is now largely – though not exclusively – a federal matter. Though there is no constitutional head of power on crime, the

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<sup>7</sup> See, eg: Lindy Kerin, ‘UNSW Defends Indigenous Guidelines Amidst Claims of “Whitewashing” and “Rewriting” History’ (*Australian Broadcasting Corporation*, 31 March 2016) <<http://www.abc.net.au/news/2016-03-30/unsw-defends-indigenous-guidelines/7285020>> accessed 8 September 2017 discussing the debate about the University of New South Wales’ guidelines, ‘Indigenous Terminology’ (University of New South Wales) <<https://teaching.unsw.edu.au/indigenous-terminology>> accessed on 8 September 2017.

<sup>8</sup> Colin Tatz, ‘Confronting Australian Genocide’ (2001) 25 *Aboriginal History* 16; Colin Tatz, ‘Genocide Studies: An Australian Perspective’ (2011) 6 *Genocide Studies and Prevention* 231.

<sup>9</sup> See, generally, Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia, 1787–1868* (Collins Harvill 1987) 354. The British Government’s Australian penal settlements were in New South Wales, Norfolk Island, Tasmania, Queensland and Western Australia. See also: Helen Doyle, ‘Penal Settlements’, in Graeme Davison, John Hirst, and Stuart Macintyre (eds), *The Oxford Companion to Australian History* (OUP 2003).

<sup>10</sup> Ian McLean, *Why Australia Prospered* (Princeton University Press 2012) 82.

<sup>11</sup> Brief accounts of these developments have been compiled by the National Museum of Australia as part of the ‘Defining Moments’ project: see, eg, ‘White Australia Policy Begins’, ‘Gold Rushes’, and ‘Postwar Immigration’ (National Museum of Australia) <[http://www.nma.gov.au/online\\_features/defining\\_moments/featured](http://www.nma.gov.au/online_features/defining_moments/featured)> accessed 6 September 2017.

<sup>12</sup> Amy Nethery and Rosa Holman, ‘Secrecy and Human Rights Abuse in Australia’s Offshore Immigration Detention Centres’ (2016) 20 *The International Journal of Human Rights* 1018, 1019–1021; Lisa Millar, ‘Australia’s Asylum Seeker Policies Heavily Criticised at UN Human Rights Council Review’ (*ABC News*, 10 November 2015) <<http://www.abc.net.au/news/2015-11-10/australias-asylum-policies-heavily-criticised-at-united-nations/6926032>> accessed on 8 September 2017. See further below: Part 5.2.

<sup>13</sup> New South Wales, Queensland, South Australia, Tasmania, Western Australia, and Victoria.

<sup>14</sup> Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia: History, Principle, and Interpretation* (CUP 2014) 29.

Commonwealth has assumed authority to create offences under the other subject-specific *placita* in section 51, as well as section 52, which establishes the Commonwealth's exclusive powers, particularly with respect to its officers and territories.<sup>15</sup> Resting on both these sources is the Commonwealth Criminal Code, which is contained in a Schedule of the *Criminal Code Act 1995 (Cth)*. The *Criminal Code 1995 (Cth)* was intended to clarify and harmonise the general and special rules of federal criminal law, and possibly serve as model for state law reform.<sup>16</sup> That said, other Commonwealth acts contain other offence provisions, procedural rules, and specific departures from the general liability rules with relevance to companies.<sup>17</sup> Many regulatory and *mens rea* offences remain the province of the states.

Regulatory competence over business organisations is likewise divided along federal lines. The Commonwealth has power to legislate on 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth' under section 51(xx) Constitution. However, an early High Court decision read this *placitum* to exclude federal competence over the formation of companies.<sup>18</sup> Later decisions both confirmed this interpretation<sup>19</sup> and cast doubt on the constitutional validity of cooperative arrangements on company law between the federal government and the states.<sup>20</sup> In response, the states referred their powers over the registration and regulation of corporations to the Commonwealth under section 51(xxxvii) Constitution. Passed pursuant to this and other heads of power in section 51,<sup>21</sup> the Corporations Act 2001 (*Cth*) now regulates the registration of local and foreign corporations in Australia, as well as their internal governance, financing, and winding-up. A bevy of other state and federal laws pertains to the operation of businesses of all types. States retain general regulatory power over non-profit associations and partnerships, as well as sole traders, and may legislative to create *sui generis* corporations within the meaning of section 51(xx).<sup>22</sup>

It follows that the regulation of corporate-society relations in Australia is shared between the Commonwealth and the states and is dispersed, within those jurisdictions, between general criminal statutes and special-purpose legislation. The objects of regulation may be companies incorporated under the *Corporations Act 2001 (Cth)* or bodies corporate created under other acts, state or federal. Simplifying this complexity for the purposes of this chapter, we focus on the criminalisation and prosecution of offences in the *Criminal Code*

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<sup>15</sup> Neil Williams, *Federal Criminal Law* (LexisNexis, 2015), para 1.035.

<sup>16</sup> Parliament of the Commonwealth of Australia (Senate), 'Explanatory Memorandum: Criminal Code Bill 1994', 1-3.

<sup>17</sup> Williams (n 15), para 5A-005, citing and discussing *inter alia* the Crimes Act 1914 (Cth), No 12 of 1914, as amended; Corporations Act 2001 (Cth), No 50 of 2001 as amended, section 796A.

<sup>18</sup> *Huddart, Parker & Co Pty Ltd v Moorehead* [1909] 8 CLR 330, discussed in Phillip Lipton, Abe Herzberg, and Michele Welsh, *Understanding Company Law* (Lawbook Co, 18th edn, 2016), para 1.25.

<sup>19</sup> *New South Wales v Commonwealth* [1990] 169 CLR 482, 498 (Mason CJ etc) discussed Aroney et al (n 14), 181-182.

<sup>20</sup> See generally RP Austin and Ian Ramsey, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th edn, 2013) para 2.170.

<sup>21</sup> Corporations Act 2001 (Cth), s 3(1).

<sup>22</sup> *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Ors v Queensland Rail & Anor* [2015] 256 CLR 171.

1995 (*Cth*) and the liability of corporations registered under the *Corporations Act 2001 (Cth)* ('companies').

### 3 The legal framework: International law and domestic legislation

Assessed on the basis of its international commitments and federal criminal laws, Australia is a good international corporate citizen. The *Criminal Code 1995 (Cth)* prohibits conduct that Australia has obligated itself to prevent and suppress in international law. There are corresponding federal principles on corporate criminal responsibility and jurisdiction, as well as an evolving web of state and Commonwealth rules on corporate criminal procedure. We describe the legal framework in this Part 3, before considering the special problems of its application in Part 4.

#### 3.1 Australia's international commitments

Through its federal executive,<sup>23</sup> Australia is party to key agreements on crime control and human rights. Australia belongs to the twin human rights covenants,<sup>24</sup> as well as anti-discrimination treaties and conventions on special categories of person.<sup>25</sup> The 'Fifth Continent' has also joined the Rome Statute of the International Criminal Court ('ICC') ('Rome Statute')<sup>26</sup> and the Organisation for Economic Co-operation and Development's Convention on the Bribery of Foreign Public Officials in International Business Transactions ('OECD Convention').<sup>27</sup> Australia has both signed and ratified the UN Conventions against Corruption ('UNCAC')<sup>28</sup> and Organized Crime ('UNTOC').<sup>29</sup> At the level of soft law, Australia participates in the Financial Action Task Force,<sup>30</sup> and adheres to the OECD

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<sup>23</sup> Constitution, s 61. See further: Jennifer Clarke, Patrick Keyzer, and James Stellios, *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis, 9th edn, 2013), paras 3.4.3–3.4.4; Alexander Reilly, Gabrielle Appleby, and Laura Grenfell, *Australian Public Law* (OUP, 2nd edn, 2014), 347.

<sup>24</sup> International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171, ratified by Australia 13 August 1980; International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 23 March 1976, 993 UNTS 3, ratified by Australia 10 December 1975.

<sup>25</sup> Eg International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966, into force 4 January 1969, 660 UNTS 195, ratified by Australia 30 September 1975; Convention on the Rights of the Child, New York, 20 November 1989, entry into force 2 September 1990, 1577 UNTS 3, ratified by Australia 17 December 1990; Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, 3 September 1981, 1249 UNTS 13, ratified by Australia 28 July 1983.

<sup>26</sup> Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, 2187 UNTS 3, ratified by Australia 9 December 1998.

<sup>27</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 17 December 1997, in force 15 February 1999, ILM, 37 (1998), 1, ratified by Australia 18 October 1999.

<sup>28</sup> United Nations Conventions against Corruption, New York, 31 October 2003, in force 14 December 2005, 2349 UNTS 41, signed by Australia 9 December 2003 and ratified by Australia 7 December 2005.

<sup>29</sup> United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, in force 19 September 2003, 2225 UNTS 209, signed by Australia 13 December 2000 and ratified by Australia 27 May 2004.

<sup>30</sup> Financial Action Task Force (FATF), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations (2012) <[www.fatf-gafi.org](http://www.fatf-gafi.org)> accessed on 8 September 2017.

Guidelines for Multinational Enterprises.<sup>31</sup> It 'encourages businesses to apply the United Nations Guiding Principles on Business and Human Rights',<sup>32</sup> the implementation of which is now subject to multistakeholder review. Previously, a 'top tier' Australian law firm, *Allens Arthur Robinson*, authored a report on corporate criminal liability for the Secretary General's Special Representative.<sup>33</sup> Subsequently, *Allens* also prepared a 'Stocktake on Business and Human Rights in Australia' at the request of the *Department of Foreign Affairs and Trade* ('DFAT'). Its purpose was to 'inform future discussions, including regarding the question of the potential development of a [National Action Plan]' for implementing the Principles.<sup>34</sup>

Australia has recognised an array of international crimes as offences against the Commonwealth. *Cassimatis* and colleagues recall that legislation on war crimes was introduced in 1945 to enable the prosecution of individuals for offences committed during World War II.<sup>35</sup> Following Australia's ratification of the Rome Statute, moreover, federal Parliament passed legislation to enable cooperation with the International Criminal Court ('ICC')<sup>36</sup> and to criminalise 'offences against humanity' under the Code.<sup>37</sup> The offences in Division 268 are extensive, though the amendments were presented as a means to protect Australia's criminal jurisdiction in international criminal matters.<sup>38</sup> Further, Australia's dualist approach to international law notwithstanding,<sup>39</sup> there is some (albeit quite limited) Federal Court precedent for the view that the customary offence of genocide has been received into the Australian Common Law.<sup>40</sup> The 'expectations of the international community' were also relevant to the High Court's recognition of indigenous ('native') title

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<sup>31</sup> OECD, 'Responsible Business Conduct: OECD Guidelines for Multinational Enterprises' (Organisation for Economic Cooperation and Development) <<http://mneguidelines.oecd.org/guidelines>> accessed on 6 September 2017.

<sup>32</sup> Attorney-General's Department (Cth), 'Business and Human Rights' <[www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Business-and-Human-Rights.aspx](http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Business-and-Human-Rights.aspx)> accessed on 9 September 2017.

<sup>33</sup> Allens Arthur Robinson, "'Corporate Culture' as a Basis of the Criminal Liability of Corporations: Report prepared by Allens Arthur Robinson for the United Nations Special Representative of the Secretary-General on Human Rights and Business' (2008) <[www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf](http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf)> accessed on 6 September 2017.

<sup>34</sup> Allens, 'Stocktake on Business and Human Rights in Australia' (April 2017) <<http://dfat.gov.au/international-relations/themes/human-rights/business/Documents/stocktake-on-business-and-human-rights-in-australia.pdf>> accessed on 8 September 2017, 4.

<sup>35</sup> Anthony Cassimatis et al, *An Australian Companion to Harris: Cases and Materials on International Law* (Lawbook Co, 2nd edn, 2011), 435.

<sup>36</sup> International Criminal Court Act 2002 (Cth), No 41 of 2002.

<sup>37</sup> International Criminal Court (Consequential Amendments) Act 2002 (Cth), No 42 of 2002.

<sup>38</sup> Parliament of the Commonwealth of Australia (House of Representatives), 'Explanatory Memorandum: International Criminal Court (Consequential Amendments) Bill 2002'.

<sup>39</sup> Clarke, Keyzer, and Stellios (n 23) paras 3.4.5–3.4.6; Reilly, Appleby, and Grenfell (n 23) 347, 349.

<sup>40</sup> *Nulyarimma v Thomson* [1999] FCR 153 (Merkel J). See further Cassimatis et al (n 35) Ch 3. Clarke, Keyzer, and Stellios (n 23) paras 3.4.5–3.4.6; Reilly, Appleby, and Grenfell (n 23) 347, 349 citing and discussing *Minister for Immigration and Ethnic Affairs v Teoh* [1983] 158 CLR 1; *Mabo v Queensland (No 2)* [1992] 175 CLR 1.

in *Mabo v Queensland (No 2)* (*'Mabo'*).<sup>41</sup> Other cases elaborate the proposition that international law is relevant to statutory interpretation.<sup>42</sup>

The Code has likewise been progressively amended to reflect to Australia's obligations under the multilateral conventions on the suppression of transnational crime, as well as to control risks to and from Australians overseas. The bribery of foreign public officials, for example, was added to the *Criminal Code 1995 (Cth)* to give effect to the OECD Convention.<sup>43</sup> The related offence of money laundering had already been criminalised in federal law<sup>44</sup> and was later incorporated into the Code.<sup>45</sup> (Customer due diligence and reporting obligations are separately legislated.<sup>46</sup>) A new federal 'false accounting offence' was introduced to the Code in mid-2016.<sup>47</sup> And, as this report was being finalised, the federal executive was considering responses to proposed amendments of Division 70 *Criminal Code 1995 (Cth)*<sup>48</sup> and the Senate Standing Committee on Economics had recommenced its inquiry into foreign bribery. It is considering (amongst other things) the 'jurisdictional reach' of the foreign bribery laws and the 'liability of parent companies for subsidiaries and intermediaries, including joint ventures'.<sup>49</sup>

Other federal action on transnational business regulation includes an illegal timber importation and processing regime<sup>50</sup> and a proposal for new public reporting law with respect to 'modern slavery'.<sup>51</sup>

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<sup>41</sup> [1992] 175 CLR 1, 42 (Brennan J).

<sup>42</sup> See Reilly, Appleby, and Grenfell (n 23) 358–359 citing and discussing *Minister for Immigration and Ethnic Affairs v Teoh* [1983] 158 CLR 1 amongst others.

<sup>43</sup> Simon Bronitt, 'Policing Corruption and Corporations in Australia: Towards a New National Agenda' (2013) 27 *Criminal Law Journal* 283, 287, citing and discussing Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999 (Cth), No 43 of 1999.

<sup>44</sup> See Proceeds of Crime Act 1987(Cth), No 87 of 1987, s 81.

<sup>45</sup> Criminal Code 1995 (Cth), Div 400 added with the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002, No 86 of 2002.

<sup>46</sup> Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth), No 169 of 2006; Financial Transaction Reports Act 1988, No 64 of 1988.

<sup>47</sup> Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Act 2016 (Cth), No 15 of 2016, adding s 490.1 et seq to the Criminal Code.

<sup>48</sup> Attorney-General's Department (Cth), 'Exposure Draft' (n 3).

<sup>49</sup> Senate Standing Committee on Economics, 'Foreign Bribery: Terms of Reference' (Parliament of Australia, 2016) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Foreignbribery45th](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreignbribery45th)> accessed 7 September 2017, paras b(ii) and (b)(vi)(D). The broad ranging terms of reference were focused upon 'The measures governing the activities of Australian corporations, entities, organisations, individuals, government and related parties with respect to foreign bribery, with specific reference to the effectiveness of, and any possible improvements to, Australia's implementation of its obligations under ... the OECD Convention and ... UNCAC'.

<sup>50</sup> Illegal Logging Prohibition Act 2012 (Cth), No 166 of 2012. See further Ryan Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier' (2016) 17 *Melbourne Journal of International Law* 188.

<sup>51</sup> Attorney-General's Department (Cth), 'Modern Slavery Consultation Paper' (n 3).

### 3.2 The Commonwealth corporate criminal liability rules

Part 2.5 *Criminal Code 1995 (Cth)* sets out the general conditions upon which corporations may be criminally responsible for offences against Commonwealth law. Section 12.1 states two general principles, namely, that (1) 'bodies corporate' are subject to the Code 'in the same way' as individuals, with modifications being provided for in that Part or necessarily following from the imposition of criminal liability on a body corporate; and (2) 'A body corporate may be found guilty of any offence, including one punishable by imprisonment'. Section 12.2 then provides rules for the attribution of the physical elements of an offence to a body corporate. In effect, a corporation is objectively liable if the wrongful acts or omissions were committed by its employee, agent, or officer, who was acting within the actual or apparent scope of the person's employment relationship or authority.<sup>52</sup> According to section 12.3, a corporation will possess criminal intention, knowledge, or recklessness if it 'expressly, tacitly or impliedly authorised or permitted the commission of the offence'.<sup>53</sup> 'Authorisation or permission' are established *inter alia* with proof that:<sup>54</sup>

- (a) ... the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (b) ... a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (c) ... a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- (d) ... the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

Corporate negligence is made out under section 12.4 by reviewing 'the body corporate's conduct ... as a whole' so as to determine whether the general requirements in section 5.5 *Criminal Code 1995 (Cth)* are met. In other words, the decision-maker may 'aggregat[e] the conduct of any number of [the body corporate's] employees, agents or officers' so as to ascertain whether there has been a criminal failure to exercise reasonable care in the circumstances. The term 'bodies corporate' is not defined but is also not regarded as problematic by the Australian authorities interviewed by the Working Group on Bribery for its Phase 2 report on Australia's compliance with *OECD* anti-bribery norms.<sup>55</sup>

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<sup>52</sup> *Criminal Code 1995 (Cth)*, s 12.2.

<sup>53</sup> *Criminal Code 1995 (Cth)*, s 12.3(1).

<sup>54</sup> *Criminal Code 1995 (Cth)*, s 12.3(2).

<sup>55</sup> *OECD Working Group on Bribery in International Business Transactions ('OECD Working Group'), 'Australia: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions' (OECD 2006) <<http://www.oecd.org/australia/australia-oecdanti-briberyconvention.htm>> accessed 8 September 2017, para 150.*

Part 2.5 *Criminal Code 1995 (Cth)* has been noted internationally for its ‘holistic’ approach to corporate fault,<sup>56</sup> but criticised locally for both its breadth and narrowness. On the one hand, during consultations on the draft *Criminal Code 1995 (Cth)*, it was argued that the concept of ‘corporate culture’ was too vague to ground corporate criminal liability and too much geared towards prevention, when compared to individual criminal liability rules.<sup>57</sup> On the other hand, a proposal to introduce a corporate ‘failing to prevent’ offence for foreign bribery could be seen as an admission of the difficulty of proving that a company’s corporate culture ‘directed, encouraged, tolerated or led to’ bribery or that the company itself ‘failed create or maintain’ a compliant corporate culture.<sup>58</sup> Subject to procedural changes discussed further below, there may be little reason for companies to ‘self-report’ violations of federal criminal law, quite less to disclose potentially incriminating material, as part of an investigation. Under the proposed changes, a defendant company would bear the legal burden of showing that it had in place adequate procedures to prevent its ‘associates’ from committing foreign bribery.<sup>59</sup>

### 3.3 The Commonwealth’s jurisdiction rules

Just as Australia has been proactive in its adoption of international, transnational, and corporate criminal liability rules, so it has been expansive in its approach to jurisdiction. All crime is presumptively local in Australian Common Law.<sup>60</sup> Whilst the *Criminal Code 1995 (Cth)* retains this preference, it also provides that a wide range of offences apply outside Australia’s territorial borders. The Code’s general and specific extraterritorial jurisdiction provisions are supported by the Commonwealth’s implied constitutional power to legislate on matters external to Australia.

#### 3.3.1 *The Common Law position*

Already by Federation, the maxim *extra territorium ius dicenti impune non paretur* was part of Australian Common Law.<sup>61</sup> ‘The jurisdiction over the crime belongs to the country where

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<sup>56</sup> See, eg, Wells (n 1) 85, 127; Adán Nieto Martín and Marta Muñoz de Morales, ‘Compliance Programs and Criminal Law Responses: A Comparative Analysis’, in Stefano Manacorda, Francesco Centonze, and Gabrio Forti (eds), *Preventing Corporate Corruption: The Anti-Bribery Compliance Model* (Springer, 2014), 336; Mark Pieth and Radha Ivory, ‘Emergence and Convergence: Corporate Criminal Liability Principles in Overview’, in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer, 2011), 14, 25–26.

<sup>57</sup> Allens Arthur Robinson (n 33) 13, citing evidence from the Hon. Chief Justice Gleeson, Senate Legal and Constitutional Committee, Criminal Code Bill 1994 and Crimes Amendment Bill 1994 (December 1994) 31, as well as a ‘senior commercial litigation solicitor’. For contrasting views of the law from a high judicial officer, see Justice Robert French, ‘The Culture of Compliance: A Judicial Perspective’ (2003) Federal Judicial Scholarship 16.

<sup>58</sup> Attorney-General’s Department (Cth), ‘Foreign Bribery Exposure Draft’ (n 3) cl 70.5A.

<sup>59</sup> Attorney-General’s Department (Cth), ‘Foreign Bribery Consultation Paper’ (n 3) 15.

<sup>60</sup> *MacLeod v Attorney-General for New South Wales* [1891] AC 455, 458 (Halsbury LC). See also Bernadette McSherry, ‘Terrorism Offences in the “Criminal Code”: Broadening the Boundaries of Australian Criminal Laws’ (2004) 27 University of New South Wales Law Journal 354, 367.

<sup>61</sup> *MacLeod* (ibid) (Halsbury LC) translated in Aaron Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (OUP 2009) as ‘one who give a judgment outside his territory may be disobeyed with impunity’.

the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever'.<sup>62</sup> Therefore, a defendant colonist, who had married women in New South Wales and in Missouri, USA, had not committed bigamy within the meaning of NSW legislation. The statute was construed 'subject to the well-known and well-considered limitation, that [the lawmakers] were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony'.<sup>63</sup> Latter day commentators likewise maintain that there is a 'presumption that statutes creating offences do not have extraterritorial effect'.<sup>64</sup> Australian courts assume that legislation applies only within Australian territory unless the contrary intention is established 'express[ly] ... or by necessary implication from the nature, purpose and policy of the legislation'.<sup>65</sup> According to *Bagaric* and *Fisse*, Australian courts have utilised all four of the 'essential elements', 'terminatory', 'initiatory', and effects tests to determine whether they have territorial jurisdiction in a given case.<sup>66</sup> The authors assert that the tests are not exclusive and that multiple grounds may be relevant to a single matter.<sup>67</sup>

### 3.3.2 *The general jurisdictional rules of the Criminal Code 1995 (Cth)*

Commencing Part 2.7 *Criminal Code 1995 (Cth)*, Division 14 recalls the Common Law presumption of territoriality. The effect of section 14.1(1) is that 'standard geographical jurisdiction' applies if so much is specified in 'a law of the Commonwealth' or 'unless the contrary intention appears'.<sup>68</sup> Under section 14.1(2), a person commits an offence when 'the conduct ... occur[ed] wholly or partly in Australia ... or ... a result of the conduct occurs wholly or partly in Australia ...'.<sup>69</sup> Hence, there is no requirement that Australia be the country that principally suffered the effects of the crime or where the offence was commenced or completed. Section 14.1(3) provides a defence if jurisdiction is based on the results of an offence and the conduct 'occur[red] wholly in a foreign country' where it was not criminal.

Division 15 then extends geographical jurisdiction utilising the nationality and universality principles. Section 15.1 offences (Category A) may be committed anywhere in the world if, 'at the time of the alleged offence, the person [was] an Australian citizen; or ... a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory'.

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<sup>62</sup> *MacLeod* (ibid), 458–459 (Halsbury LC).

<sup>63</sup> *ibid* 459 (Halsbury LC).

<sup>64</sup> Simon Bronitt and Miriam Gani, 'Shifting Boundaries of Cybercrime: From Computer Hacking to Cyber-Terrorism' (2004) 28 *Criminal Law Journal* 303, 310. See also Brent Fisse and Mirko Bagaric, *The Laws of Australia*, 'Criminal Law Principles: The Criminal Laws' (as at 1 August 2016), para 9.1.1370.

<sup>65</sup> Nathan Hancock, 'Research Paper No 13 2001-02, Terrorism and the Law in Australia: Supporting Materials' (Parliament of Australian, Canberra, 2002), <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp0102/02rp13#doc11](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0102/02rp13#doc11)> accessed 7 September 2017.

<sup>66</sup> Fisse and Bagaric (n 64) para 9.1.1230.

<sup>67</sup> *ibid*.

<sup>68</sup> *Criminal Code 1995 (Cth)*, s 14.1(1). For discussion of a statute evincing a contrary intention, see *R v Ahmad* (2012) 31 NTLR 38.

<sup>69</sup> *ibid* s 14.1(2)(a)–(b). NB: The commission of offences 'wholly or partly on board an Australian aircraft or an Australian ship' is also covered. See also *Criminal Code 1995 (Cth)*, ss 16.2 to 16.4, which elaborate the core concepts – 'Australia', 'conduct occurring partly in Australia', and 'result of conduct' – for that Part.

With regards to jurisdiction, Section 15.2 (Category B) offences are identical to Category A offences but also capable of being committed by Australian residents. Both Category A and B offences are subject to a foreign law defence.<sup>70</sup> Section 15.3 (Category C) covers the conduct of any national or resident anywhere, subject to that dual criminality requirement for non-Australian citizens or bodies corporate.<sup>71</sup> Section 15.4 (Category D) operates similarly to Category C but is not so limited. It reflects the customary principles of universal jurisdiction, i.e., the competence of States to 'define and punish crimes committed abroad by and against foreign nationals'.<sup>72</sup> That said, Category D covers more than the Australia enactments of crimes against international humanitarian law.<sup>73</sup> It embraces (amongst other things) several acts associated with terrorism, espionage, and foreign incursions and recruitment,<sup>74</sup> as well as some property and dishonesty offences.<sup>75</sup>

Under section 16.1 *Criminal Code 1995 (Cth)*, the Attorney-General must consent to a prosecution if there is no territorial connection to an offence under sections 14.1 or 15.1–15.4 and '(c) at the time of the alleged offence, the person alleged to have committed the offence is neither: (i) an Australian citizen; nor (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory'.

### 3.3.3 *Offences-specific active and passive personality jurisdiction*

Whilst some transnational and international crimes are extraterritorial by virtue of this Part 2.7,<sup>76</sup> others omit any reference to the A to D categorisation and instead provide that conduct is criminal (or capable of being prosecuted) when it is committed abroad.

The active personality principle is incorporated into prototypical corporate economic crimes, as well as more novel extraterritorial offences involving acts of sexual exploitation of minors. Thus, the offence of bribery of foreign public officials may only be committed outside Australia if the alleged offender was an Australian citizen or resident at the time of the offence, or a 'body corporate incorporated by or under a law of the Commonwealth or of a State or Territory'.<sup>77</sup> Similarly, for the primary offence of money laundering, conduct committed wholly outside Australia is not criminal unless the personal requirements of Australian citizenship, residency, or incorporation are met, or the assets themselves are naturalised through their connection to an Australian indictable offence.<sup>78</sup> The child sex

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<sup>70</sup> *ibid* ss 15.1(2) and (4), 15.2(2) and (4).

<sup>71</sup> *ibid* s 15.3(2) and (4).

<sup>72</sup> Bernard Oxman, *Max Planck Encyclopedia of Public International Law* (November 2007), 'Jurisdiction of States', para 37.

<sup>73</sup> Cp Cedric Ryngaert, *Jurisdiction in International Law* (OUP, 2nd edn, 2015), 121, 126.

<sup>74</sup> See eg *Criminal Code 1995 (Cth)*, ss 80.4(1), 91.1(6), 101.1(2), 102.9, 103.3, 117.2.

<sup>75</sup> See eg *Criminal Code 1995 (Cth)*, ss 131.1 (4), 134.3, 135.5, 136.1(8), 141.1 (4), 144.1 (9), 376.5, 380.5.

<sup>76</sup> See eg *Criminal Code 1995 (Cth)* ss 270.9, 271.10, applying Category B jurisdiction to slavery-like offences and Division 271 offences other than domestic trafficking in persons or organs; at ss 268.117, 270.3A, applying Category C jurisdiction to crimes against the administration of the ICC and Category D jurisdiction to the offences of genocide, crimes against humanity, war crimes, and slavery.

<sup>77</sup> *Criminal Code 1995 (Cth)*, ss 70.2, 70.5.

<sup>78</sup> *ibid*, s 400.15(1). Under section 400.15(1)(b) an alternative ground for geographical jurisdiction is that: 'the conduct constituting the alleged offence occurs wholly outside Australia (but not on board an Australian

crimes in Division 272 are *per se* extra-territorial in that they apply only when the conduct occurs outside the Commonwealth; however, the alleged offender must have had, at the relevant time, one of four personal connections to Australia.<sup>79</sup> For a body corporate, these are that it was a: '(c) body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or (d) any other body corporate that carries on its activities principally in Australia'. Since there is no requirement of dual criminality in Division 272, such bodies corporate may be liable even if the conduct was not criminal in the jurisdiction in which it occurred.<sup>80</sup>

Whilst these provisions depend on the alleged offender's Australian nationality, residence, or place of incorporation, other parts of Commonwealth law confer jurisdiction over actions that 'victimise' Australia or Australians. The passive personality principle was (controversially) the basis for the offences of 'Harming Australians' in Part 5.4 *Criminal Code 1995 (Cth)*. The provisions of Division 115 make it a crime for persons of other nationalities outside Australia to murder, manslaughter, or intentionally or recklessly cause serious harm to Australian citizens and residents.<sup>81</sup> Enacted soon after the so-called Bali Bombings of 2002, these offences were originally intended to enable Australia to prosecute individuals who perpetrated an attack in Indonesia that killed eighty-eight Australians.<sup>82</sup> *Cassimatis* and colleagues suggest that the protective principle is the basis for the Crimes (Currency) Act 1980 (Cth), which seeks to regulate the counterfeiting of money and other currency-related offences.<sup>83</sup> Citing *Senz* and *Charlesworth's* discussion of so-called 'blocking legislation' in Australia, the authors note that the Commonwealth has 'taken steps against assertions of civil jurisdiction by other States which Australia considers excessive'.<sup>84</sup> In the anti-drug and

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aircraft or an Australian ship) and the money or other property: (i) is proceeds of crime; or (ii) is intended to become an instrument of crime; or (iii) is at risk of becoming an instrument of crime; in relation to a Commonwealth indictable offence, a State indictable offence, an Australian Capital Territory indictable offence or a Northern Territory indictable offence'. See further Danielle Ireland-Piper, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?' (2012) 13 *Melbourne Journal of International Law* 122, 141.

<sup>79</sup> *ibid* s 272.6.

<sup>80</sup> See further James McNicol and Andreas Schloenhardt, 'Australia's Child Sex Tourism Offences' (2011–2012) 23 *Current Issues in Criminal Justice* 369, 388.

<sup>81</sup> *Criminal Code 1995 (Cth)*, ss 115.1–115.4.

<sup>82</sup> See generally Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 4th edn, 2017), 1087–1089. The authors note that, under the Crimes Legislation Amendment (Harming Australians) Act 2015 (Cth), No 163 of 2015, the murder and manslaughter provisions were extended to cover conduct occurring before the date of the bombings (and even the enactment of the Code), though subject to new dual criminality and double jeopardy requirements. On the attacks themselves, see National Museum of Australia, 'Defining Moments in Australian History: Bali Bombings' <[www.nma.gov.au/online\\_features/defining\\_moments/featured/bali\\_bombings](http://www.nma.gov.au/online_features/defining_moments/featured/bali_bombings)> accessed 8 September 2017.

<sup>83</sup> *Cassimatis et al* (n 35) 149. See also Danielle Ireland-Piper, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' (2013) *Utrecht Law Review* 9, 68.

<sup>84</sup> *Cassimatis et al* (n 35) 148–149, citing Deborah Senz and Hilary Charlesworth, 'Building Blocks: Australia's Response to Foreign Extraterritorial Legislation' (2001) 2 *Melbourne Journal of International Law* 69 who discuss the Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cth), No 3 of 1984.

terrorism contexts, the seeming reluctance of the Commonwealth to claim jurisdiction or diplomatic protection has been remarked upon.<sup>85</sup>

### 3.3.4 *The power of Parliament to legislate extraterritorially*

The power of the Commonwealth to proscribe conduct extraterritorially derives from section 51(xxix) Constitution, which gives Parliament capacity ‘to make laws for the peace, order, and good government of the Commonwealth with respect to ... external affairs’. The High Court has consistently held that the external affairs power is not limited to matters concerning Australia’s relations with other states or the implementation of international treaty obligations. Rather, the power extends to the regulation of ‘places, persons, matters or things’ that are geographically external to the nation and, perhaps, to matters of ‘international concern’.<sup>86</sup> In *Polyukhovich v Commonwealth* and *XYZ v Commonwealth* the Court upheld the Commonwealth’s power to proscribe conduct on the basis of the alleged perpetrator’s Australian nationality (active personality).

#### *Polyukhovich v Commonwealth – The War Crimes Case*

At issue in *Polyukhovich*, was an information (charge) for war crimes allegedly committed in Ukraine during the German occupation.<sup>87</sup> Commonwealth legislation retrospectively criminalised conduct that had occurred in Europe between 1 September 1939 and 8 May 1945. The only apparent connection to Australia was the requirement that the person charged be an Australian citizen and resident at that time.<sup>88</sup> For slightly different reasons, the majority found that the externality of the conduct to Australian territory sufficed for section 51(xxix) Constitution: there was no need for an additional connection to Australia’s interests.<sup>89</sup> Justice *Brennan*, though dissenting, implied that the external affairs power could – in principle – support legislation that gives effect to an international obligation to assume universal jurisdiction over war crimes.<sup>90</sup> Both Justices *Brennan* and *Toohy* could be read to suggest that the passive personality principle would ground legislation under the external affairs power, at least where the threat is extraterritorial.<sup>91</sup>

#### *XYZ v Commonwealth – Australia’s ‘child sex tourism’ legislation*

In *XYZ*, the High Court affirmed – if not extended – the majority’s approach to ‘externality’ in *Polyukhovich*. The challenge in *XYZ* was to legislation that utilised the nationality principle to criminalise acts of indecency by Australian citizens and residents against minors overseas

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<sup>85</sup> See, generally, Natalie Klein, ‘David Hicks, Stern Hu, Scott Rush, Jock Palfreeman and the Legal Parameters of Australia’s Protection of its Citizens Abroad’ (2011) 35 Melbourne University Law Review 134.

<sup>86</sup> *Polyukhovich* (n 2) 632 (Dawson J); *Victoria v The Commonwealth* [1996] 187 CLR 416, 485 (Brennan CJ, Toohey, Gaudron, McHugh, and Gummow JJ); *XYZ* (n 2) 539 (Gleeson CJ). See also Clarke, Keyzer, and Stellios (n 23) 3.4.11; Reilly, Appleby, and Grenfell (n 23) 353–354.

<sup>87</sup> *Polyukhovich* (n 2) Mason CJ, Dawson, Toohey, and McHugh JJ (Brennan, Deane, and Gaudron JJ dissenting).

<sup>88</sup> *ibid* 526 (Mason CJ).

<sup>89</sup> *ibid* 529–530 (Mason CJ), 599–606 (Deane J, dissenting on other grounds), 632–638 (Dawson J); 712–714 (McHugh J), 695–697 (Gaudron J); cp. 653, 655 (Toohey J), 552 (Brennan J).

<sup>90</sup> *ibid* 562–563 (Brennan J).

<sup>91</sup> *ibid* 655 (Toohey J), 552 (Brennan J).

(so-called ‘child sex tourism’ laws).<sup>92</sup> Chief Justice *Gleeson* cited international law and state practice to support his broad reading of the ‘matters external’ limb of section 51(xxix) Constitution.<sup>93</sup> Justices *Gummow*, *Hayne*, and *Crennan* likewise found that the legislation was valid and would have been so even if Australian ‘nationality’ was not a requirement.<sup>94</sup> Justices *Callinan* and *Heydon* disagreed, ruling that the ‘child sex tourism’ legislation was unconstitutional and finding *Polyukhovich* wrongly decided to the extent that it did not require a connection to Australia’s relations with other countries or international organisations.<sup>95</sup> Justice *Kirby* also expressed scepticism of the majority’s view, though he found that the extraterritorial laws did concern Australia’s foreign relations with Thailand, in that case.<sup>96</sup>

Lower federal and state supreme courts have accepted the majority position as precedential in more recent counter-terrorism cases.<sup>97</sup> Uncertainty still surrounds the capacity of the Commonwealth to regulate on matters of ‘international concern’, including when this is established through international ‘soft laws’;<sup>98</sup> however, this may be something of a moot point for the present chapter given the breadth of the ‘geographical externality’ limb of section 51(xxix) Constitution.

### 3.4 Federal criminal procedure law

The rules of procedure in Commonwealth criminal cases reflect the federal division of powers and, at least in part, the special nature of corporate criminal proceedings. The *Australian Federal Police* (‘AFP’) is responsible for investigating offences against Commonwealth law.<sup>99</sup> Within the AFP, a specialised Fraud and Anti-Corruption ‘business area’ now houses ‘the multi-agency Fraud and Anti-Corruption Centre’ that, in turn, ‘coordinates the multi-agency Serious Financial Crime Taskforce’.<sup>100</sup> The AFP prepares briefs of evidence, which it transfers to the *Commonwealth Department of Public Prosecutions* (‘CDPP’)<sup>101</sup> for trial in state courts.<sup>102</sup> The criminal procedure acts of Victoria and Western Australia contain detailed rules on corporate prosecutions,<sup>103</sup> and, throughout Australia, the Common

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<sup>92</sup> XYZ (n 2), 544–545 (Gummow, Hayne, and Crennan JJ).

<sup>93</sup> *ibid* 536–537.

<sup>94</sup> *ibid* 552.

<sup>95</sup> *ibid* 583–604.

<sup>96</sup> *ibid* 575–576.

<sup>97</sup> *Alqudsi v The Commonwealth of Australia* [2015] 91 NSWLR 92, 97–99 (Basten JA), 112–116 (Leeming JA), see also 126 (McCallum JA); *Jaffarie v Director General of Security and Anor* [2014] ALD 102, 613 (Flick and Perram JJ).

<sup>98</sup> *Polyukhovich* (n 2) (Brennan J). Cf XYZ (n 2) (Callinan, Heydon, and Kirby JJ); *Alqudsi* (n 97) (Leeming JA) 122–125.

<sup>99</sup> Judiciary Act (Cth), s 68.

<sup>100</sup> Australian Federal Police, ‘Fraud and Anti-Corruption Centre’ <<https://www.afp.gov.au/what-we-do/crime-types/fraud/fraud-and-anti-corruption>> accessed 9 September 2017.

<sup>101</sup> Williams (n 15), paras 1–015.

<sup>102</sup> Williams (n 15), paras 1–020. See also Judiciary Act 1903, No 6, 1903, s 39B(1A)(c) and note thereto.

<sup>103</sup> Criminal Procedure Act 2004 (WA), No 071 of 2004, s 88(6), Div 6; Criminal Procedure Act 2009 (Vic), No 7 of 2009, ss 82, 154, 214.

Law privilege against self-incrimination does not benefit legal persons.<sup>104</sup> Currently, the federal government is considering a scheme to incentivise corporations to cooperate with law enforcers in exchange for deferred prosecution agreements,<sup>105</sup> as well as revisions to Australian whistleblower protection laws.<sup>106</sup>

### 3.5 Preliminary conclusions

The *Criminal Code 1995 (Cth)* prohibits a wide range of behaviours that Australia has international obligations to address. Corporations may be held liable for this conduct in several ways under Part 2.5 and Australian courts and law enforcers may exercise broad territorial and extraterritorial jurisdiction via Part 2.7. What remains to be seen is how those rules apply to companies with multinational operations under Australia's substantive and procedural federal criminal law.

## 4 Special problems: Scope and enforcement

A special focus of the *AIDP* Questionnaire is the extent to which multinational enterprises may be prosecuted for international and transnational crimes,<sup>107</sup> not least, when they are in the private military and security business. In this Part 4, we consider the special problems of scope and effectiveness before canvassing the non-criminal options for deterrence and remediation in Part 5.

### 4.1 Intra-group corporate criminal responsibility

The first issue is whether an Australian company could be liable as a principal for crimes committed in the context of a foreign subsidiary's operations. As a matter of general law, companies within corporate groups are separate legal entities; they may limit the liability of their members to contribute to company debts.<sup>108</sup> There are some grounds for 'piercing the corporate veil' in Australian law but none applies to criminal wrongs per se.<sup>109</sup> Therefore, an

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<sup>104</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477. See further Daniella Andrewartha et al, *Investigating Crime: The Laws of Australia* (LawBook Co 2013), para 11.2.800. NB: There are also some offence specific procedural rules in the Criminal Code 1995 (Cth), see, Division 272, Subdivision E.

<sup>105</sup> See Attorney-General's Department (Cth), 'Improving Enforcement Options for serious Corporate Crime: Proposed Model for a Deferred Prosecution Agreement Scheme in Australia, Public Consultation Paper' (March 2017) <<https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx>> accessed 7 September 2017. See also 'Deferred Prosecutions – Discussion Paper' (16 March 2016) <<https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx>> accessed 7 September 2017.

<sup>106</sup> Parliamentary Joint Committee on Corporations and Financial Services, 'Whistleblower Protections' (Parliament of Australia, 14 September 2017), <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/WhistleblowerProtections](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections)> accessed 19 September 2017.

<sup>107</sup> For more detail about the arguments raised in this Part, see Radha Ivory and Anna John, 'Holding Companies Responsible? The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations' (2017) 40 University of New South Wales Law Journal 1175.

<sup>108</sup> *Salomon v Salomon & Co Ltd* [1897] AC 22; *Walker v Wimborne* [1976] 137 CLR 1; Corporations Act 2001 (Cth), ss 9, 119, 124(1), 516.

<sup>109</sup> Cp Corporations Act 2001 (Cth), s 588V (holding company liability for insolvent trading by a subsidiary firm).

Australian parent company will only be liable under Part 2.5 *Criminal Code 1995 (Cth)* if it is itself attributable with the physical and mental elements of a Commonwealth offence.

#### 4.1.1 Attribution of the physical elements of an offence

Section 12.2 *Criminal Code 1995 (Cth)* provides that the physical elements of an offence must be attributed to a body corporate if those elements were ‘committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority’. It is uncontroversial that a natural person may be an ‘employee, agent or officer’ and that they may hold multiple roles with multiple companies. On this basis, it seems that section 12.2 would be triggered by individuals who were sole appointees of the parent firm or jointly engaged by both the parent and child companies. In addition, it is arguable that a parent body corporate could be prevented from denying that a person was its agent if it had made relevant representations about the person to outsiders.<sup>110</sup> This follows from the rules on ostensible or apparent authority that section 12.2 would appear to have incorporated by reference.<sup>111</sup> However, we doubt that the subsidiary itself would be treated as the holding company’s ‘agent’ under Part 2.5, as per *Smith, Stone & Knight Ltd v Birmingham Corporation*.<sup>112</sup> Australian courts have questioned<sup>113</sup> and distinguished that English authority, including in a ‘veil piercing’ case brought to hold parent companies liable in tort.<sup>114</sup> The Australian Competition and Consumer Commission has also failed in attempts to show that local subsidiaries are agents for foreign parent companies under the extraterritorial provisions of federal anti-trust laws.<sup>115</sup>

A further requirement, that the conduct be within the scope of the person’s authority or employment, was broadly interpreted by the Supreme Court of Queensland in *Australian Securities and Investments Commission v Managed Investments Ltd and Ors (No 9)* (*Managed Investments Ltd (No 9)*).<sup>116</sup>

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<sup>110</sup> *Freeman & Lockyer v Buckhurst Properties (Mangal) Ltd* [1964] 2 QB 480; *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising and Addressing Co Pty Ltd* [1975] 133 CLR 72; *Pacific Carriers Limited v BNP Paribas* (2004) 218 CLR 451. See also *Corporations Act 2001 (Cth)*, ss 128, 129(3).

<sup>111</sup> On the importance of the general law authority rules to the provisions generally, see Tahnee Woolf, ‘The Criminal Code Act 1995 (Cth): Towards a Realist Vision of Corporate Criminal Liability’ (1997) 21 *Criminal Law Journal* 257, 259.

<sup>112</sup> *Smith, Stone & Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116; applied in *Spreag v Paeson Pty Ltd* [1990] 94 ALR 679.

<sup>113</sup> *ACN 007 528 207 Pty Ltd (in liq) v Bird Cameron (reg) and Others* [2005] SASC 204, 595 (Besanko J); *Premier Building and Consulting Pty Ltd v Spotless Group Ltd and Others* [2007] 64 ACSR 114, 190 (Byrne J).

<sup>114</sup> *Briggs v James Hardie & Co Pty Ltd* [1989] 16 NSWLR 549, 577 (Rogers JA). See also *Adams v Cape Industries plc* [1990] 1 Ch 433 544 (Slade LJ).

<sup>115</sup> See, eg, *Bray v F Hoffman-La Roche Ltd and Others* [2002] 118 FCR 1 (upheld by the Full Court in *Bray v F Hoffman-La Roche Ltd and Others* [2003] 130 FCR 317; *ACCC v Yazaki Corporation (No 2)* (2015) ALR 396; *ACCC v Prysmian Cavi E Sistemi S.R.L. (No 12)* [2016] FCA 822 (regarding Nexan SA) discussed in *Ivory and John* (n 107) 1188 with further references.

<sup>116</sup> [2016] QSC 109, [612]–[613] discussed in *Ivory and John* (n 107) 1189 with further references. See also *Australian Securities and Investments Commission v Managed Investments Ltd (No 10)* [2017] QSC 96 (penalty and final orders). In late June 2017, the individual defendants filed Notices of Appeal: see *Australian Securities*

#### 4.1.2 Attribution of the mental elements of an offence

Section 12.3(2)(a)–(d) *Criminal Code 1995 (Cth)* then set forth conditions in which a body corporate may be attributed with the mental states of intention, knowledge or recklessness. *Clough* and *Mulhern* suggest that there will be exceptional cases in which evidence of board authorisation will be able to be deduced from board minutes, such as would be necessary for attribution pursuant to section 12.3(2)(a).<sup>117</sup> As to section 12.3(2)(b), it would appear that the provision covers both the ‘directing mind and will’ of a company and lower level personnel with duties relevant to the contravention. In *Managed Investments Ltd (No 9)*, several officers and a fund manager of a company were found to be ‘high managerial agents’ for the purposes of the *Criminal Code 1995 (Cth)* and the managed investment provisions of the *Corporations Act 2001 (Cth)*.<sup>118</sup> Notably, most but not all, of the officers were appointed to roles within the subsidiary.<sup>119</sup>

If the wrongdoer cannot be identified and relevantly connected to the parent company under section 12.3(2)(a) or (b), the Crown must successfully raise the ‘corporate culture’ rules of section 12.3(3)(c) and (d) – or the charges will fail. Section 12.3(6) defines ‘corporate culture’ to ‘mea[n] an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place’. It would seem from this definition that a corporate culture may arise through social interactions and tacit understandings about permissible conduct, as well as formalised company rules and procedures.<sup>120</sup> This said, it is still an apparent requirement of the Code that it was the defendant company’s corporate culture that ‘encouraged, tolerated or led to non-compliance with the relevant provision’, or that the defendant company itself failed to ‘create and maintain a corporate culture that required compliance with the relevant provision’. At least on a narrow view, the Crown would have to establish that the attitudes

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and Investments Commission, ‘17-157MR Queensland Supreme Court Imposes Penalties on Dishonest MFS Officers and Funds Manager’ (26 May 2017) <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-157mr-queensland-supreme-court-imposes-penalties-on-dishonest-mfs-officers-and-funds-manager>> accessed 8 September 2017.

<sup>117</sup> Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (OUP 2002), 141.

<sup>118</sup> *Managed Investments Ltd (No 9)* (n 116), paras 612–613. See also *Australian Competition and Consumer Commission v Davies* (2015) 339 ALR 436, 444, para 41 (concept of ‘high managerial agent’ in a sole director and shareholder company).

<sup>119</sup> Ivory and John, ‘Holding Companies Liable’ (n 107) 1191 citing and discussing *Managed Investments Ltd (No 9)* [2016] QSC 109, paras 13–14, 651–652, 679 (‘[O]ne individual (Mr King) was only appointed as an officer of the ultimate holding company at the time of the payments. He was held to be an officer of the defendant subsidiary by virtue of his participation in significant business decisions for the subsidiary and his capacity to affect its financial standing’). See also *Managed Investments Ltd (No 10)* [2017] QSC 96, paras 71–103.

<sup>120</sup> See, eg, Criminal Law Officers Committee, *Model Criminal Code: Final Report*, Ch 2: General Principles of Criminal Responsibility (Commonwealth of Australia, 1993), 111, quoting Stewart Field and Nico Jorg, ‘Corporate Manslaughter and Liability: Should We Be Going Dutch?’ (1991) *Criminal Law Review* 156, 159. See also *Criminal Code 1995 (Cth)*, s 12.3(4).

and courses of conduct emanated from individuals with authority to act for the parent company, as opposed to the subsidiary.<sup>121</sup>

#### 4.2 Corporate liability for core crimes subject to the universality principle

The second problem concerns the scope of Australia's extraterritorial crimes of violence. Genocide, crimes against humanity and war crimes are subject to Category D universal jurisdiction under s 268.117 *Criminal Code 1995 (Cth)*; hence, Australian courts and law enforcers could technically prosecute a foreign subsidiary.<sup>122</sup> But, are such offences capable of being committed by corporations? And, in any case, how are private military and security contractors criminally regulated in Australia, especially when they work for the Australian government?

##### *Anvil Ltd and the Kilwa Incident*

Writing on the so-called *Anvil/Kilwa* incident, *Kyriakakis* discusses possible substantive limits to Part 2.5 *Criminal Code 1995 (Cth)*.<sup>123</sup> Incorporated in Canada but with its head office in Australia, *Anvil Mining Ltd* was the ultimate owner of companies operating a copper and silver mine near *Kilwa*, Democratic Republic of Congo.<sup>124</sup> In 2005, the Australian Broadcasting Corporation aired a documentary alleging that companies within the *Anvil Mining* group had provided 'logistical support' to a Congolese counter-insurgency operation in *Kilwa* in October 2004.<sup>125</sup> During the attack, the military is said to have engaged in summary executions, acts of torture and unlawful imprisonment, and rape, amongst other human rights abuses. The AFP commenced an investigation in 2005 but ceased its inquiries in 2007.<sup>126</sup> In the meantime, *Kyriakakis* considered whether entities, like *Anvil* and its subsidiaries, could commit Division 268 offences.<sup>127</sup> She acknowledged the argument that Division 268 is no broader in scope than the Rome Statute, which only claims jurisdiction over individuals under Article 25(1). However, she concluded that the presumption of corporate capacity in section 12.1(1) is not displaced: 'If the Division 268 offences were not

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<sup>121</sup> For discussion of an alternative reading, see further Ivory and John (n 107) 1193–1194 with further references. See also Allens Arthur Robinson (n 33) 76.

<sup>122</sup> *Criminal Code 1995 (Cth)*, s 268.117; Adam McBeth, 'Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector' (2008) 11 *Yale Human Rights and Development Journal* 127, 149–150.

<sup>123</sup> See also Justice Ian Binnie et al, 'The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases' (Amnesty International and International Corporate Accountability Roundtable, October 2016) <[www.commerccrimehumanrights.org/wp-content/uploads/.../CCHR-0929-Final.pdf](http://www.commerccrimehumanrights.org/wp-content/uploads/.../CCHR-0929-Final.pdf)> accessed 9 September 2017, 16–19.

<sup>124</sup> Joanna Kyriakakis, 'Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code' (2007) 5 *Journal of International Criminal Justice* 809.

<sup>125</sup> Sally Neighbour, 'Four Corners: The Kilwa Incident' (Australian Broadcasting Corporation, 6 June 2005) <[www.abc.net.au/4corners/content/2005/s1384238.htm](http://www.abc.net.au/4corners/content/2005/s1384238.htm)> accessed 8 September 2017 discussed in McBeth (n 122) 133.

<sup>126</sup> McBeth (n 122) 148–149, 151. See also Binnie et al (n 123) 17.

<sup>127</sup> Kyriakakis (n 124) 814–818. See also McBeth (n 122) 149–150.

intended to apply to corporations, an exception to this effect should presumably have been included, or the term individual rather than persons used in the drafting of the offences'.<sup>128</sup>

Presuming that corporations may be liable for 'core' crimes of violence, a further question is how Australian federal criminal law holds to account those contractors who provide private military and security services to businesses or governments ('PMSCs').

#### *PMSCs and (corporate) criminal liability in Australia*

The starting point would appear to be that Australian private security companies and personnel are subject to the *Criminal Code 1995 (Cth)* like all other Australian nationals, residents, or corporations.<sup>129</sup> In addition, persons who are authorised to accompany the *Australian Defence Force ('ADF')* may consent to being designated as 'defence civilians' under the *Defence Force Discipline Act 1982 (Cth)*.<sup>130</sup> In such a case, they may also be extraterritorially liable for crimes against the law of the *Australian Capital Territory ('ACT')*.<sup>131</sup> Otherwise, the *Crimes (Overseas) Act 1964 (Cth)* extends *ACT* criminal law to some Commonwealth contractors in designated countries (currently: Iraq, Afghanistan, the Solomon Islands, Papua New Guinea, and Nauru).<sup>132</sup> The Act's utility may be limited, however, by its exclusive application to Australian citizens and permanent residents.<sup>133</sup> As *Liivoja* explains of the guards engaged by *DFAT* in Iraq and Afghanistan,<sup>134</sup> those contractors who fit neither category would be beyond the scope of *ACT* criminal law.<sup>135</sup>

#### 4.3 Political will and the enforcement gap

Aside from these issues of scope, there are concerns with the under-enforcement of federal corporate criminal laws. Other Australian academics have argued that the country is yet to engage significantly in the practice of foreign bribery law enforcement or 'asset recovery' as required by Chapter V *UNCAC*.<sup>136</sup> There are signs that this trend may shift; however, the effectiveness of Australia's anti-foreign bribery regime is still a live issue in Australia.

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<sup>128</sup> Kyriakakis (n 124) 816.

<sup>129</sup> Rain Liivoja, 'Out Of Sight, Out Of Mind, Out Of Reach?' (2016) 1 *IHL Magazine* 16 <[www.redcross.org.au/files/Business\\_IHL\\_Magazine\\_WEB.PDF](http://www.redcross.org.au/files/Business_IHL_Magazine_WEB.PDF)> accessed 8 September 2017, 17.

<sup>130</sup> *Defence Force Discipline Act 1982 (Cth)*, s 3. See also Liivoja (n 129).

<sup>131</sup> See *Defence Force Discipline Act 1982 (Cth)*, ss 3, 9, 61(1)–(3); *Jervis Bay Territory Acceptance Act 1915 (Cth)*, 4A. See also *Acts Interpretation Act 1901 (Cth)*, s 2B.

<sup>132</sup> *Crimes (Overseas) Act 1964 (Cth)*, ss 3A(5), 4; *Crimes (Overseas) (Declared Foreign Countries) Regulations 2003*. See also Liivoja (n 129).

<sup>133</sup> *Crimes (Overseas) Act 1964 (Cth)*, s 3.

<sup>134</sup> Philip Dorling, 'DFAT Spends Quarter of a Billion Guarding Foreign Embassies' (*The Sydney Morning Herald*, 23 February 2015) <<http://www.smh.com.au/national/dfat-spends-quarter-of-a-billion-guarding-foreign-embassies-20150220-13ko1i.html>> accessed 8 September 2017.

<sup>135</sup> Liivoja (n 129).

<sup>136</sup> Jo-Anne Gilbert and Jason Sharman, 'Turning a Blind Eye to Bribery: Explaining Failures to Comply with the International Anti-corruption Regime' (2016) 64 *Political Studies* 74; Jason Sharman, *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption* (Cornell University Press, 2017).

*Political will – Closing the enforcement gap for foreign bribery*

Political corruption has been described as ‘a recurrent theme in Australia life’, with objections to the abuse of public authority dating back to the ‘earliest colonial period’.<sup>137</sup> Since the 1970s, moreover, successive state commissions of inquiry have aired allegations of official involvement in organised and financial crime; in some instances, these were followed by convictions of senior politicians or members of the state executive.<sup>138</sup> There are now standing anti-crime commissions in several Australian states and some public debate about the establishment of a federal equivalent.<sup>139</sup>

Australia is also no stranger to allegations of corporate foreign bribery. In the mid-2000s, Australian companies were implicated in the events leading to the so-called UN ‘Oil-For-Food’ inquiry. A Royal Commission found possible breaches of Australian criminal law on the part of Australian Wheat Board Ltd and associated individuals; nonetheless, an AFP Task Force ceased investigation in 2009 without laying charges.<sup>140</sup> In another ongoing matter,<sup>141</sup> it would appear that a former chief financial officer/company secretary was found guilty of false accounting offences under state law.<sup>142</sup> According to media reports from July 2017, in another case, three individuals ‘pleaded guilty to bribing a foreign official to secure construction contracts’ in Iraq.<sup>143</sup> Outside Australia, the *United States Securities and Exchange Commission* (‘SEC’) has settled allegations that *BHP Billiton Ltd* violated the US Foreign Corrupt Practices Act through its Beijing Olympic sponsorship,<sup>144</sup> and *Rio Tinto Ltd* announced that it had self-reported allegations in connection with a Guinean iron ore

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<sup>137</sup> Bronitt (n 43) 283.

<sup>138</sup> Ian MacAllister, ‘Corruption and Confidence in Australian Political Institutions’ (2014) 49 *Australian Journal of Political Science* 174, 175–176, 179.

<sup>139</sup> The Senate, ‘Select Committee on a National Integrity Commission: Report’ (The Commonwealth of Australia, September 2017) 181.

<sup>140</sup> Legal and Constitutional Affairs Reference Committee, ‘Work Undertaken by the Australian Federal Police’s Oil for Food Taskforce’ (Commonwealth of Australia, 2015), <[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/AFP\\_Oil](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AFP_Oil)> accessed 9 September 2017, 49. See further Richard Baker and Nick McKenzie, ‘Senate Inquiry to Investigate Explosive Federal Police Bribery Claims over Wheat Board Oil-For-Food Scandal’ (*The Age*, 26 June 2014) <<http://www.theage.com.au/federal-politics/political-news/senate-inquiry-to-investigate-explosive-federal-police-bribery-claims-over-wheat-board-oilforfood-scandal-20140626-zsn4d.html>> accessed 8 September 2017.

<sup>141</sup> Paul Latimer, ‘Anti-bribery Laws – Compliance Issues in Australia’ (2017) 24 *Journal of Financial Crime* 4, 11; Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, ‘Integrity of Overseas Commonwealth Law Enforcement Operations’ (Parliament of Australia, 2013) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Australian\\_Commission\\_for\\_Law\\_Enforcement\\_Integrity/Completed\\_inquiries/2010-13/integrity\\_inter\\_op/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Australian_Commission_for_Law_Enforcement_Integrity/Completed_inquiries/2010-13/integrity_inter_op/report/index)> accessed 21 September 2017, 9–10.

<sup>142</sup> *R v Ellery* [2012] VSC 349.

<sup>143</sup> Jake Sturmer, ‘Mamdouh Elomar, Ibrahim Elomar and John Jousif Plead Guilty to Bribing Foreign Minister’ (*Australian Broadcasting Corporation*, 10 July 2017) <<http://www.abc.net.au/news/2017-07-10/is-fighter-mohamed-elomar-guilty-bribing-iraq-minister/8693518>> accessed 29 September 2017.

<sup>144</sup> United States Securities and Exchange Commission, ‘Press Release: SEC Charges BHP Billiton With Violating FCPA at Olympic Games 2015-93’ (20 May 2015) <[www.sec.gov/news/pressrelease/2015-93.html](http://www.sec.gov/news/pressrelease/2015-93.html)> accessed 8 September 2017.

investment to US, UK, and Australian authorities.<sup>145</sup> Allegations against smaller ‘miners’, engineering and services firms are regularly ventilated in the media.<sup>146</sup>

The OECD Working Group on Bribery has been consistently watchful and, at times critical, of enforcement (in)action in Australia. After granting Australia a grace period to demonstrate its ‘will’ for prosecution in its Phase 2 report,<sup>147</sup> the Working Group was more critical in Phase 3.<sup>148</sup> Released in 2012, the examiners expressed ‘seriou[s] concer[n]’ ‘that Australia has only one case that has led to foreign bribery prosecutions since it enacted its foreign bribery offence in 1999 ... Out of 28 referrals received, 21 have been concluded without charges, and only one has resulted in prosecutions’.<sup>149</sup> The follow-up report noted an increase in the number of investigations by the AFP, but still only one prosecution as of 2015 and there monitoring was difficult due to the existence of suppression orders.<sup>150</sup> The Phase 4 evaluation of Australia is due to be presented to the Working Group in December 2017.<sup>151</sup>

#### 4.4 Preliminary conclusions

In summary, there are questions about the scope and the enforcement of Australia’s legal framework for suppressing transnational and international crime. Whilst *Kyriakakis* discounted the argument that corporations may not be liable for ‘core’ international crimes of violence under the *Criminal Code 1995 (Cth)*, we found uncertainty about the breadth of Part 2.5 in the context of multinational groups of companies and concern about the level of foreign bribery enforcement action.

### 5 Alternatives: Other domestic legal frameworks and social sanctions

Given the apparent difficulties with interpreting and enforcing federal corporate criminal law, what other mechanisms could achieve the goals of corporate accountability for international and transnational crimes? In this next part, we canvas the key alternatives to corporate criminal prosecutions.

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<sup>145</sup> Matthew Stevens, ‘Rio Tinto: JS Jacques Says the Miner is “Shell-Shocked” by Guinea Scandal’ (*Australian Financial Review*, 14 November 2016) <<http://www.afr.com/business/mining/rio-tinto-js-jacques-says-the-miner-is-shellshocked-by-guinea-scandal-20161114-gsozun#ixzz4SEa6fXOM>> accessed 8 September 2017.

<sup>146</sup> For a recent list, see: The Age, ‘Investigations Show Australia Needs Tougher Laws against Bribery and Corruption’ (Editorial) (*The Age*, 25 August 2016) <[www.theage.com.au/comment/the-age-editorial-investigations-show-australia-needs-tougher-laws-against-bribery-and-corruption-20160825-gr16dn.html](http://www.theage.com.au/comment/the-age-editorial-investigations-show-australia-needs-tougher-laws-against-bribery-and-corruption-20160825-gr16dn.html)> accessed 8 September 2017.

<sup>147</sup> OECD Working Group (n 55) 49.

<sup>148</sup> OECD Working Group, ‘Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia’ (OECD, October 2012) <<http://www.oecd.org/australia/australia-oecdanti-briberyconvention.htm>> accessed 9 September 2017.

<sup>149</sup> *ibid* 19, see also 5, 12–13.

<sup>150</sup> OECD Working Group, ‘Australia: Follow-Up to the Phase 3 Report & Recommendations’ (OECD, 2015) <<http://www.oecd.org/australia/australia-oecdanti-briberyconvention.htm>> accessed 8 September 2017, 4.

<sup>151</sup> Working Group on Bribery in International Business Transactions, ‘Monitoring Schedule, December 2016–June 2024’ <<http://www.oecd.org/corruption/oecd-anti-bribery-convention-phase-4.htm>> accessed 7 September 2017.

## 5.1 Corporate law: Directors' duties and disclosure obligations

The first issue is the extent to which senior corporate managers may be personally liable for failing to ensure that their companies comply with federal criminal law or otherwise protect human rights. Company directors and officers have fiduciary duties and duties of care under statute and the general law. Section 181(1) *Corporations Act 2001 (Cth)* requires them to act in good faith in the best interests of the company and for a proper purpose. Traditionally, the interests of company were understood to be those of the members ('corporators') as a whole;<sup>152</sup> however, there is some authority to suggest that the directors may consider the long-term interests of the company as an ongoing business enterprise.<sup>153</sup> One Parliamentary 'CSR' inquiry took the view that the current law is 'sufficiently broad to enable corporate decision-makers to take into account the environmental and other societal impacts of their decisions'.<sup>154</sup> Further, section 180(1) *Corporations Act 2001 (Cth)* requires directors and officers to 'exercise their powers and discharge their responsibilities with the degree of care and diligence that a reasonable person would exercise' in like circumstances. In December 2016, one former Australian Wheat Board officer was found to have violated section 180(1),<sup>155</sup> and, according to Hall, the civil penalty provisions have been used with some success in other such *Oil-For-Food* cases.<sup>156</sup> The statutory duties are principally enforced by ASIC, though criminal proceedings may be brought by the Commonwealth Director of Public Prosecutions for some obligations.<sup>157</sup> Particular shareholders have a limited right to bring civil derivative actions.<sup>158</sup>

In addition, some Australian companies are required to disclose and report matters with relevance to business and human rights. First, ASX-listed companies have obligations to

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<sup>152</sup> *Greenhalgh v Arderne Cinemas Ltd*, [1951] Ch 286, 291 (Evershed MR). See generally Austin and Ramsey (n 20), paras 8.090–8.070; Paul Redmond, 'Directors' Duties and Corporate Social Responsiveness' (2012) 25 *University of New South Wales Law Journal* 317, 329.

<sup>153</sup> *Darvall v Nothern Sydney Brick and Tile Co Ltd* [1988] 6 ALLC 154. Cp. *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, 291; *Ngurli Ltd v McCann* [1955] 90 CLR 425, 438.

<sup>154</sup> Corporations and Markets Advisory Committee (CAMAC), 'The Social Responsibility of Corporations' (Australian Government, 2006) <<http://www.camac.gov.au/camac/camac.nsf/byheadline/reportsfinal+reports+home.html>> accessed 9 September 2017, 111. See also Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS), 'Corporate Responsibility: Managing Risk and Creating Value' (*Parliament of Australia*, 2006) <[www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/Completed\\_inquiries/2004-07](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07)> accessed 9 September 2017, xiii–xiv

<sup>155</sup> *Australian Securities and Investments Commission v Flugge*; *Australian Securities and Investments Commission v Geary* [2016] VSC 779, paras 21–22.

<sup>156</sup> Kath Hall, 'Foreign Bribery: Submissions Received by the Committee, Submission No 9' (*Senate Standing Committees on Economics*, August 2015) <[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Foreign\\_Bribery/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreign_Bribery/Submissions)> accessed 8 September 2017, citing and discussing *ASIC v Lindberg* [2012] VSC 332; *ASIC v Ingelby* [2012] VSC 339. See also reports of the reopening of an ASIC investigation into the conduct of the AWB Chairman and a former executive: Darren Mara, 'Senate Inquiry to Investigate Explosive Federal Police Bribery Claims over Wheat Board Oil-For-Food Scandal' (*SBS*, 13 October 2015) <<http://www.sbs.com.au/news/article/2015/10/13/wheat-dictator-and-kickbacks-awb-case-reopened>> accessed 8 September 2017.

<sup>157</sup> *Corporations Act 2001 (Cth)*, s 184(1) (criminal offences concerning duties of good faith, use of position and of information). There is no criminal equivalent of the duty of care under section 180(1).

<sup>158</sup> See, generally, *Corporations Act 2001 (Cth)*, Part 2F.1A.

comply with the *ASX Corporate Governance Principles and Recommendations* (or to explain their non-compliance), as well as to continuously disclose material information to the market under the Listing Rules.<sup>159</sup> The *ASX Listing Rules* are part of the contract between the ASX and the listed company; however, they may also be enforced inter alia by ASIC and by a 'person aggrieved by [a] failure' to abide by them.<sup>160</sup> Second, companies involved in the issuance of 'financial products' must disclose some CSR-related matters to potential clients under the financial product parts of the *Corporations Act 2001 (Cth)*.<sup>161</sup> Third, under a new proposal, the Commonwealth could 'require entities operating in Australia with total annual revenues of at least \$100 million to report annually on their efforts to address modern slavery in their operations and supply chains'.<sup>162</sup> The definition of 'modern slavery' would align with relevant provisions of the *Criminal Code 1995 (Cth)*<sup>163</sup> and the concept of 'entities' would include – but not be limited to – companies. Modelled on the UK's *Modern Slavery Act 2015*, the proposal does not foresee 'punitive penalties for non-compliance'.<sup>164</sup>

Individual or organisational accountability mechanism may also combine with publicity requirements, as the litigation against the *James Hardie* group showed. Directors may be liable for breach of duty in connection with announcements made to the market with respect to risk management strategies.<sup>165</sup>

#### *The James Hardie asbestos products case*

From the late 1930s to the end of the 1980s, two companies in the *James Hardie* corporate group manufactured and sold building materials containing asbestos. The products were used extensively in Australia, although it was known, by the 1960s, that asbestos fibres could give rise to a range of potentially fatal health conditions. Some of those symptoms could present decades after exposure. In 2001, the parent company (*James Hardie Industries Ltd, 'JHIL'*) approved a restructure of the group's operations both to reflect a change in its business and to manage its 'legacy' risks. A new holding company was to be incorporated in the Netherlands and a foundation established in Australia to own the subsidiaries liable for the historical personal injury claims. After it emerged that the foundation was substantially underfunded, ASIC secured civil penalties against the directors of the parent for breaches of their duties to the company under the *Corporations Act 2001 (Cth)*.<sup>166</sup> In addition, the *James Hardie* group received media attention and was the object of several state and federal government inquiries.<sup>167</sup> There was some recognition that an exception to the

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<sup>159</sup> ASX Listing Rules, Rules 3.1, 4.10.3.

<sup>160</sup> Corporations Act 2001 (Cth), s 793C(1).

<sup>161</sup> 1013A, 1013D. See further Nolan (n 5) n 23.

<sup>162</sup> Attorney-General's Department (Cth), 'Modern Slavery Consultation Paper' (n 3) 12.

<sup>163</sup> *ibid* 14 (referring to *Criminal Code 1995 (Cth)*, Divisions 270 and 271).

<sup>164</sup> *ibid* 17.

<sup>165</sup> *ASIC v Macdonald (No 11)* [2009] 71 ACSR 368; *ASIC v Hellicar* [2012] HCA 17 (3 May 2012).

<sup>166</sup> The High Court delivered judgment in the case in *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17 (3 May 2012). See also *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 71 ACSR 368.

<sup>167</sup> David Jackson, QC, 'Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation' (New South Wales, September 2004), <<http://www.specialcommissions>

separate entity and limited liability principles would be desirable, at least where a tort claimant is an employee of an underfunded subsidiary.<sup>168</sup> However, ultimately, the courts did not pierce the corporate veil and Parliament did not modify the statutory directors' duties under the *Corporations Act 2001 (Cth)*.

## 5.2 Civil law: Tort claims and class actions

Whilst Australian judges have not yet been willing to pierce the veil of incorporation to protect tort victims of subsidiaries, it is possible that Australian state courts could award civil law damages to some individuals harmed by a body corporate's own overseas operations. In the asbestos cases, courts have found that parent companies owe duties of care directly to employees of subsidiaries where sufficient control by the parent is established.<sup>169</sup> With *Dagi and Others v The Broken Hill Proprietary Company Ltd and Another (No 2)* ('*Dagi No. 2*'), there is at least some precedent of Australian courts accepting jurisdiction to hear cases in which parent corporations themselves cause loss or damage to overseas individuals or communities.

### *Environmental torts and extraterritorial civil jurisdiction*

In the mid-1990s, tribal people from *Papua New Guinea (PNG)* brought a series of actions in the state of Victoria against *Broken Hill Proprietary Company Ltd ('BHP')* and its subsidiary *Ok Tedi Mining Ltd ('OMPL')*. The cases concerned the *Ok Tedi* copper mine, which the *BHP* group had established in the Western Province of *PNG* under an agreement with the *PNG* government. The plaintiffs alleged that *BHP* and/or *OMPL* had polluted a river catchment of which they were the traditional owners or possessors.<sup>170</sup> Justice *Bryne* of the Supreme Court of Victoria found that the claims concerning trespass or title to lands in *PNG* were not justiciable; due to the acts of state doctrine, he was also precluded from determining claims under *BHP's* agreement with *PNG*.<sup>171</sup> However, the claimant's arguments about 'loss of amenity or enjoyment of the said land, of the waters of the *Ok Tedi* River, and of the floodplain' could be heard, even though they would require evidence about foreign (*PNG*) law.<sup>172</sup> *Dagi No. 2* settled, but is cited as example of Common Law courts exercising their ordinary torts jurisdiction to enforce extraterritorial corporate wrongs.<sup>173</sup> Writing on

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.justice.nsw.gov.au/mrcfinquiry> accessed on 9 September 2017 ('Jackson Report'); CAMAC (n 154); PJCCFS (n 154). See also Corporations and Markets Advisory Committee, 'Long-Tail Liabilities: The Treatment of Unascertained Future Personal Injury Claims, Report' (Australian Government, 2008) <<http://www.camac.gov.au/camac/camac.nsf/byheadline/reportsfinal+reports+home.html>> accessed on 9 September 2017.

<sup>168</sup> *Briggs* (n 114) 577–578 (Rogers JA).

<sup>169</sup> See, eg, *CSR Ltd v Wren* [1997] 44 NSWLR 463; *CSR Ltd v Young* [1998] 16 NSWCCR 56.

<sup>170</sup> *Dagi and Others v The Broken Hill Proprietary Company Ltd and Another (No 2)* [1997] 1 VR 428 ('*Dagi No 2*').

<sup>171</sup> *Dagi No 2* [1997] 1 VR 428, 433–447, 452–455, citing and discussing *British South Africa Co. v Companhia de Moçambique* [1893] AC 602.

<sup>172</sup> *Dagi No 2* [1997] 1 VR 428, 451–452.

<sup>173</sup> Roger P. Alford, 'Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation' (2014) 63 *Emory Law Journal* 1089, 1155; Nolan (n 5) 72.

intragroup liability for international crimes, *Nicholson and Howie* consider *Dagi No. 2* to be an extension of 'control'-based direct liability of parent companies for negligence.<sup>174</sup>

We were not able to locate a subsequent decision in which the courts relied on *Dagi No. 2* to assume civil jurisdiction over an alleged extraterritorial crime or human rights violation. However, we note that lawyers for the *Ok Tedi* claimants, *Slater and Gordon*, were engaged to investigate the possibility of civil action in the '*Kilwa incident*',<sup>175</sup> and have represented persons detained in Australia's Manus Island detention facility in a class action before the Victorian Supreme Court.

### *Offshore Detention, Class Actions, and NGO campaigns*

Under the *Migration Act 1958 (Cth)*, so-called 'unauthorised maritime arrivals' may be held indefinitely in offshore detention facilities in *Nauru* and *PNG*.<sup>176</sup> Whilst those facilities are formally hosted by the *Nauru* and *PNG* governments pursuant to *Memoranda of Understanding* ('MOUs') with Australia, they are operated by corporations under contracts with the Commonwealth. Detainees of the '*Manus Island*' facility brought a class action before the Victorian Supreme Court alleging the torts of false imprisonment and negligence in the provision of basic facilities by the Commonwealth and/or its corporate contractors.<sup>177</sup> That case settled without an admission of liability in mid-June 2017 for more than \$70 million plus costs;<sup>178</sup> the Supreme Court of Victoria approved the settlement in early September.<sup>179</sup> The High Court of Australia, meantime, has found both the *Nauru* and *Manus Island* arrangements to be lawful,<sup>180</sup> in contrast to the Supreme Court of *PNG*, which reached the

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<sup>174</sup> Rachel Nicholson and Emily Howie, 'The Impact of the Corporate Form on Corporate Liability for International Crimes: Separate Legal Personality, Limited Liability and the Corporate Veil – An Australian Law Perspective: Paper for ICJ Expert Legal Panel on Corporate Complicity in International Crimes' (February 2007) <<https://anyform.org/doc/36296/the-impact-of-the-corporate-form-on-corporate-liability-for>> accessed 8 September 2017.

<sup>175</sup> *McBeth* (n 122) 152–154.

<sup>176</sup> *Migration Act 1958 (Cth)*, No 62 of 1958, s 5AA, 198AD(2).

<sup>177</sup> *Kamasae*, 'Fourth Amended Statement of Claim', Submission in *Kamasae v Commonwealth*, SCI 2014 6770, 7 April 2017. Supreme Court of Victoria, Manus Island Detention Centre Class Action (21 July 2017) <<http://www.supremecourt.vic.gov.au/home/law+and+practice/class+actions/manus+island+detention+centre+class+action>>.

<sup>178</sup> Slater and Gordon Lawyers, 'Manus Island Class Action' (Notice of Proposed Settlement) <<https://www.slatergordon.com.au/class-actions/current-class-actions/manus-island-class-action>> accessed 29 September 2017; Ben Doherty and Calla Wahlquist, 'Government to Pay \$70m Damages to 1905 Manus Detainees in Class Action' (*The Guardian*, 14 June 2017) <<https://www.theguardian.com/australia-news/2017/jun/14/government-to-pay-damages-to-manus-island-detainees-in-class-action>> accessed on 8 September 2017.

<sup>179</sup> *BBC News*, 'Australian Court approves A\$70m Payout for PNG detainees' (*BBC News*, 6 September 2017) <<http://www.bbc.com/news/world-australia-41169922>> accessed on 7 September 2017.

<sup>180</sup> *Plaintiff M68/2015 v Minister for Immigration* [2016] 90 ALJR 297 (Gordon J dissenting); *Plaintiff S195/2016 v Minister for Immigration and Border Protection* [2017] HCA 31 17 August 2017 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

opposite conclusion of the *Manus Island* programme.<sup>181</sup> According to reports, the Australian government intends to close the *Manus Island* facility by October 2017.<sup>182</sup>

Other forms of monitoring and protest have paralleled these activities in the domestic courts. For example, the Senate reported on ‘allegations of abuse, self-harm and neglect of asylum seekers’ earlier in 2017.<sup>183</sup> As the report authors recall, ‘Several submissions have been made to the Office of the Prosecutor of the ICC requesting that Australia be investigated for crimes under international law’.<sup>184</sup> In addition, the non-governmental ‘No Business in Abuse’ initiative has been lobbying *Broadspectrum Ltd* (formerly: *Transfield Services Ltd*) to cease participation in the offshore detention programme and meet any historical claims.<sup>185</sup> In late 2016, the Initiative stated its intention to ‘engage *Ferrovial’s* clients and charitable partnerships internationally, and submit complaints to various authorities of review and investigation including the complaints procedure of the Norwegian Global Pension Fund, UN human rights bodies and the International Criminal Court’.<sup>186</sup> As of September 2017, it would seem to be planning a voluntary consumer boycott action.<sup>187</sup>

### 5.3 Special purpose (business and) human rights instruments

What Australia does not possess – and would seem reluctant to adopt – is comprehensive legislation on the extraterritorial human rights obligations of business. As early as 2000, the Australian Democrats, a political party, moved that bodies corporate with more than one hundred overseas personnel be required to meet a range of public law and regulatory standards in their foreign operations.<sup>188</sup> Their *Corporate Code of Conduct Bill 2000 (Cth)* would have imposed new compliance and reporting obligations on companies within (and outside)

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<sup>181</sup> *Namah v Pato and Ors*, SCA. No 84 of 2013, delivered 26 April 2016 (Kandakasi and Higgins JJ, other judges agreeing).

<sup>182</sup> Eric Tlozek, ‘PNG Tells Australia it Can’t Shut Manus Island Detention Centre and Leave Asylum Seekers Behind’ (*ABC News*, 25 August 2017) <<http://www.abc.net.au/news/2017-08-25/png-says-australia-cant-shut-down-manus-island-detention-centre/8844082>> accessed on 8 September 2017.

<sup>183</sup> Senate Standing Committee on Legal and Constitutional Affairs, ‘Serious Allegations of Abuse, Self-Harm and Neglect of Asylum Seekers in relation to the Nauru Regional Processing Centre, and any like Allegations in relation to the Manus Regional Processing Centre’ (Parliament of Australia, April 2017) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/NauruandManusRPCs/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report)> accessed on 6 September 2017.

<sup>184</sup> *ibid* para 6.30.

<sup>185</sup> No Business in Abuse, ‘Business in Abuse: Transfield’s complicity in gross human rights abuses within Australia’s offshore detention regime: About Us’ <[www.nobusinessinabuse.org/site/about](http://www.nobusinessinabuse.org/site/about)> accessed 29 September 2017 (‘About Us’); ‘Association with Abuse: The Financial Sector’s Association with Gross Human Rights Abuses of People Seeking Asylum in Australia’ (July 2016) <[www.nobusinessinabuse.org/site/about](http://www.nobusinessinabuse.org/site/about)> accessed 6 September 2017 (‘Association with Abuse’).

<sup>186</sup> No Business in Abuse, ‘Association with Abuse’ (n 185) 33.

<sup>187</sup> No Business in Abuse, ‘About Us’ (n 185). Cp Brian Robins, ‘Wilsons Security to Walk Away from Nauru and Manus Island in 2017’ (*The Sydney Morning Herald*, 2 September 2016), <[www.smh.com.au/business/wilsons-security-to-walk-away-from-nauru-and-manus-island-in-2017-20160901-gr6lzf.html](http://www.smh.com.au/business/wilsons-security-to-walk-away-from-nauru-and-manus-island-in-2017-20160901-gr6lzf.html)> accessed 8 September 2017 (reporting that contractors involved in the provision of offshore detention service indicated they would not be seeking further such engagements).

<sup>188</sup> Corporate Code of Conduct Bill 2000 (Cth), Part 2, see also objects cl 3, 16–17.

Australia, backed by mixture of criminal and non-criminal sanctions:<sup>189</sup> however, the Bill was rejected at the committee stage and subsequently lapsed.<sup>190</sup> Some years later, in 2006, two Federal government inquiries rejected proposals to impose statutory duties on directors to consider ‘the interests of specific classes of stakeholders or the broader community’, similar to the requirements under section 172 *Companies Act 2006 (UK)*, c. 46. They also deemed it unnecessary to ‘clarify the extent to which directors may take into account’ those interests under the existing regime of company law.<sup>191</sup> As Newton notes, ‘both found that many Australian companies had already adopted an “enlightened self-interest” approach to complying with their legal obligations’.<sup>192</sup> These relatively conservative conclusions are striking, given that they responded to the high-profile *James Hardie* product liability case.<sup>193</sup>

Caution would also appear to be reflected in the conclusions of the so-called Brennan Committee, which considered the feasibility of a human rights act for Australia.

### *The Brennan Committee and the human rights responsibilities of business*

Chaired by Jesuit Priest and prominent social activist, *Father Frank Brennan*, the *National Human Rights Consultation Committee* (‘NHRC’) was established to ascertain community perceptions of ‘[w]hich human rights (including corresponding responsibilities) should be protected and promoted’ in Australia, as well as the sufficiency of current mechanisms for achieving rights protection/promotion and possible reforms.<sup>194</sup> The Committee received a submission from Professor *Ruggie* and discussed his Guiding Principles.<sup>195</sup> The Committee also noted ‘support for requiring business to report on their observance of human rights and for establishing industry-specific complaints mechanisms’.<sup>196</sup> It perceived extra-legal moral obligations on business<sup>197</sup> and a range of administrative and private law options for responsabilising firms.<sup>198</sup> However, the NHRC recommended only that responsibilities under any federal human rights act should be limited to ‘federal public authorities’. It defined those authorities (relevantly) to include those ‘entities established by federal law and performing public functions, and other entities performing public functions under federal law or on behalf of another federal public authority’.<sup>199</sup> In any case, the Commonwealth

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<sup>189</sup> Corporate Code of Conduct Bill 2000 (Cth), cl 4, 14, 16–17.

<sup>190</sup> See generally Paul Redmond, ‘Sanctioning Corporate Responsibility for Human Rights’ (2002) 27 *Alternative Law Journal* 23, 27.

<sup>191</sup> CAMAC (n 154) 7; PJCCFS (n 154) Recommendation 1. See also Newton (n 5).

<sup>192</sup> Newton (n 5).

<sup>193</sup> Redmond (n 152) 325–327.

<sup>194</sup> NHRC, ‘Terms of Reference’ (National Library of Australia) <[http://pandora.nla.gov.au/pan/94610/20100324-0000/www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms\\_of\\_Reference.html](http://pandora.nla.gov.au/pan/94610/20100324-0000/www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms_of_Reference.html)> accessed on 5 December 2016, 66.

<sup>195</sup> NHRC Report (September 2009) <<http://pandora.nla.gov.au/pan/94610/20100324-0000/www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report.html>> accessed on 5 December 2016, Ch 3.2, 6.6.

<sup>196</sup> *ibid* 147.

<sup>197</sup> *ibid* 348.

<sup>198</sup> *ibid* 147–148.

<sup>199</sup> *ibid*, Recommendations 20.

opted ultimately not to adopt an Australian Human Right Act with these provisions or otherwise.

This history of 'CSR' and human rights reform proposals are a backdrop to speculation about how the *Ruggie Principles* could be implemented in Australia going forward. In August 2016, the Australian Human Rights Commission released a joint statement with civil society on the implementation of the UN Guiding Principles in Australia. Produced after a roundtable meeting in May of that year, the statement flagged the 'offshore operations of Australian companies' as a key challenge for Australia and noted the difficulties with ensuring remedies for victims of corporate human rights violations in Australian law.<sup>200</sup> In conjunction with the DFAT, the Australian chapter of the UN Global Compact Network subsequently advertised 'business roundtable' meetings in three capital cities: Sydney, Melbourne and Perth. The purpose of the meetings was 'to consider the development of an Australian National Action Plan on Business and Human Rights'.<sup>201</sup> Subsequently, in mid-2017, the foreign minister herself 'announce[d] the establishment of a Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights', which would report to DFAT.<sup>202</sup> As of early September 2017, no reports from the body had been published; however, in terms of process, the group is said to be drawing on the stocktake (prepared by *Allens*) and the previous consultations with business and civil society organisations.<sup>203</sup> A review of *OECD Australian National Contact Point ('ANCP')*, within Treasury, is ongoing.<sup>204</sup>

#### 5.4 Administrative law: Commissions of inquiry

Finally, we note that commissions of inquiry have figured in several of the cases mentioned above and raise complex issues of accountability costs and benefits. For one thing, they may be granted substantial powers to compel the production of documentary evidence and the appearance of witnesses.<sup>205</sup> Yet that material may not be adducible in subsequent criminal

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<sup>200</sup> Australian Human Rights Commission, Implementing the UN Guiding Principles on Business and Human Rights in Australia Joint Civil Society Statement, (*Australian Human Rights Commission*, August 2016) <<https://www.humanrights.gov.au/employers/business-and-human-rights#JointStatement>> 4–5, 18 accessed on 30 March 2017.

<sup>201</sup> UN Global Compact, 'Towards an Australian National Action Plan on Business & Human Rights: Business Roundtable Consultations' (*United Nations Global Compact*, 2016) <<http://www.unglobalcompact.org.au/events/towards-an-australian-national-action-plan-on-business-human-rights-business-roundtable-consultations>> accessed on 18 November 2016.

<sup>202</sup> Department of Foreign Affairs and Trade, 'Establishment of an Advisory Group on Business and Human Rights, Media Release' (2 June 2017) <[http://foreignminister.gov.au/releases/Pages/2017/jb\\_mr\\_170602b.aspx](http://foreignminister.gov.au/releases/Pages/2017/jb_mr_170602b.aspx)> accessed on 8 September 2017.

<sup>203</sup> Department of Foreign Affairs and Trade, 'Multi-Stakeholder Advisory Group on Implementation of the UN Guiding Principles on Business and Human Rights, Communiqué' (2 May 2017) <<http://dfat.gov.au/international-relations/themes/human-rights/business/Pages/multi-stakeholder-advisory-group-on-implementation-of-the-un-guiding-principles-on-business-and-human-rights.aspx>> accessed 8 September 2017.

<sup>204</sup> Australian Government, 'AUSNCP: 2017 Review' <[http://www.ausncp.gov.au/content/Content.aspx?doc=2017\\_review.htm](http://www.ausncp.gov.au/content/Content.aspx?doc=2017_review.htm)> accessed 8 September 2017.

<sup>205</sup> Andrewartha et al (n 104) 443.

proceedings due to differing standards of evidence, as was a key challenge for the AFP's Oil-For-Food Task Force, according to a Senate report.<sup>206</sup> In addition, we would speculate that commissions serve as something of a proxy for corporate criminal prosecutions in Australia insofar as they fulfil the social or political functions of investigation and fact-finding, albeit without the assignment of liability or the safeguards or penalties of the criminal law. This would be a matter for further research.

## 5.5 Preliminary conclusions

Australia has seen several allegations of cross-border corporate wrongs resolved outside the criminal justice system. We considered the scope of directors' and officers' duties under the *Corporations Act 2001 (Cth)* and the liabilities of parent companies in tort. We noted the lack of a federal human rights act in Australia but the possibility of a National Action Plan on business and human rights. Commissions of inquiry have been a common – though potentially problematic – response to allegations against corporations in past cases.

## 6 Outlook

'Business-and-human rights' regulation is ambiguously progressive in Australia. The Commonwealth has long used its law-making powers to transpose international and transnational criminal obligations into federal law. Both the 'general' and the 'special' parts of the *Criminal Code 1995 (Cth)* enable particular 'bodies corporate' to be held accountable for a range of extraterritorial crimes. However, Australia's federal legislators have been historically unwilling to enact an overarching human right act or to modify corporate laws so as to better encourage corporate 'insiders' to act in the interests of other, more remote stakeholders. Existing laws against transnational bribery are said to be under-enforced.

It remains to be seen whether and, if so, when and where the picture shifts. At the time this report was being finalised in September 2017, the federal government was considering a corporate 'failing to prevent foreign bribery' offence, along with deferred prosecution agreements and new laws on whistleblower protection. Outside the strictly criminal sphere, company managers have been held individually to account for breaches of duties in prominent *CSR/foreign bribery* matters. There is also discussion of a business and human rights national action plan and reporting requirements on 'modern slavery'. International organisations keep a watching brief on the transnational aspects of Australian criminal law, as do local news media, 'plaintiff' law firms, and human rights advocacy centres and groups. Given these developments, will Australia be emboldened to embrace and enforce a (more) cosmopolitan corporate criminal law? We will keep the *AIDP* posted.

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# DUTCH REPORT ON PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW

*By Emma van Gelder and Prof. Cedric Ryngaert \**

## 1 Methodology

Descriptive and empirical methods have been used in order to successfully answer the questions posed by the questionnaire. The descriptive part departs from the relevant primary sources of law, namely the existing legislation, case law, and other legal materials such as explanatory memoranda. In addition, legal doctrine and policy documents have been consulted. To shed further empirical light on the questions posed, a number of semi-structured interviews have been conducted with experts working in the field, on the basis of a proposed questionnaire (Annex A). The qualitative data gained from the interviews have been processed in this report. The combination of a doctrinal approach with interviews allows for a deeper understanding of Dutch legislation and legal practice. In particular, the combination of different methods increases the validity and reliability of the answers.

## 2 Demarcation of research

Led by the questions asked by the questionnaire, the authors have focused on international core crimes (war crimes, genocide, crimes against humanity, and torture), crimes of corruption, and, to a limited extent, other economic offences and environmental crimes. Drug offences are not addressed in this report.

## 3 General Framework for Prosecuting Corporations for Violations of International Criminal Law

### 3.1 Legal rules governing the prosecution of corporations – in a nutshell

#### 3.1.1 *Substantive criminal law establishing criminal liability*

##### *The doctrinal basis*

On the basis of article 51(1) Dutch Penal Code (hereafter: DPC) criminal liability can be established for a corporation: a corporation can be prosecuted for committing and participating in committing an offence.

To hold a corporation criminally liable, one has to inquire whether the corporation actually counts as a perpetrator, thus whether the illegal conduct by one or more natural persons can

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count as illegal conduct of the corporation.<sup>1</sup> It is this attribution of illegal conduct to the corporation that is the doctrinal basis for establishing corporate criminal liability under Dutch law.<sup>2</sup> In the *Drijffmest* case, the Dutch Supreme Court (hereafter: DSC) ruled in this respect that the possibility of ‘reasonably’ imputing (illegal) conduct to a corporation depends on the concrete circumstances of the case, which includes the nature of the conduct.<sup>3</sup> According to the DSC, it is in principle reasonable to impute conduct to the corporation when the act has occurred within the ‘sphere’ of the corporation.<sup>4</sup> This ‘sphere’ condition is met when:

- The (illegal) conduct is committed by someone who works for the corporation under a formal contract of employment or who is working for the company under any other circumstances of employment.
- The (illegal) conduct fits within the ‘normal operations’ of the corporation.
- The corporation profited from the (illegal) conduct.
- The corporation was at the ‘disposal’ of the (illegal) conduct and the corporation ‘accepted’ or ‘used to accept’ the (illegal) conduct. The scope of ‘acceptance’ includes the failure of the corporation to take reasonable care to prevent occurrence of (illegal) conduct.<sup>5</sup>

These four criteria are non-cumulative and flexible, and give the judge the freedom to formulate additional, more specific criteria.<sup>6</sup>

The DSC emphasized that its ruling exclusively applies to the *actus reus* of the (illegal) conduct and not to the *mens rea*. In order to establish the *mens rea* for the purposes of corporate criminal liability, proof has to be adduced that a corporation acted intentionally, recklessly, or with gross negligence.<sup>7</sup> Proof of *mens rea* is only required for more serious offences, the so-called *misdrijven*.<sup>8</sup>

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<sup>1</sup> FGH Kristen, ‘Maatschappelijk verantwoord ondernemen en strafrecht’, in AJAJ. Eijbsbouts & JM de Jongh (eds), *Maatschappelijk verantwoord ondernemen (Handelingen Nederlandse Juristenvereniging 2010)* (Kluwer 2010) 133.

<sup>2</sup> FGH Kristen, ‘Maatschappelijk verantwoord ondernemen en strafrecht’, in AJAJ. Eijbsbouts & JM de Jongh (eds), *Maatschappelijk verantwoord ondernemen (Handelingen Nederlandse Juristenvereniging 2010)* (Kluwer 2010) 133.

<sup>3</sup> HR 21 oktober 2003, ECLI:NL:HR:2003:AF7938, r.o. 3.4.

<sup>4</sup> WJ Koops, ‘De Hoge Raad over het ouderschap van rechtspersonen’, *V&O* 2003, afl. 12, 200; HR 21 oktober 2003, ECLI:NL:HR:2003:AF7938, r.o. 3.4.

<sup>5</sup> HR 21 oktober 2003, ECLI:NL:HR:2003:AF7938, r.o. 3.4.

<sup>6</sup> FGH Kristen, ‘Maatschappelijk verantwoord ondernemen en strafrecht’, in AJAJ Eijbsbouts & JM de Jongh (eds.), *Maatschappelijk verantwoord ondernemen (Handelingen Nederlandse Juristenvereniging 2010)* (Kluwer 2010) 137.

<sup>7</sup> M Hornman & E Sikkema, ‘Corporate Intent: In Search of a Theoretical Foundation for Corporate *Mens Rea*’, in F de Jong, JAE Vervaele, MM Boone, C Kelk, FAMM Koenraadt, FGH Kristen, D Siegel-Rozenblit & E Sikkema (eds), *Overarching views of delinquency and deviancy- rethinking the legacy of the Utrecht School* (Eleven International Publishers 2015) 290.

<sup>8</sup> BF Keulen & E Gritter, ‘Corporate Criminal Liability in the Netherlands’, in M Pieth, R Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence and Risk* (Springer 2011) 184.

Intent can be attributed indirectly to the corporation by imputing to that corporation the mental state of a natural person who was (partly) involved in the criminal conduct. According to the explanatory memorandum of article 51 DPC, this imputation is dependent on the internal organization of the corporation as well as the position and responsibilities of the natural person within this corporation.<sup>9</sup> Apart from the option of imputing the intention of a natural person to the corporation, it is also possible to combine the intention of multiple natural persons and impute such 'united intent' to the corporation. Negligence can also be imputed to the corporation according to this manner.<sup>10</sup>

Intent or negligence can also be imputed to the corporation *directly*, by proving the existence of intent or negligence of the corporation itself. This intent or negligence can then be deduced from for instance the internal organisation of the corporation, such as how the corporation is managed, the decision-making culture, the factual course of events, and the mental climate within the corporation.<sup>11</sup>

Corporate criminal liability is thus established on the basis of deficiencies within the structures, policies, and culture of the corporation itself.<sup>12</sup>

#### *Is corporate criminal liability limited to specific offences?*

Before 1976, corporate criminal liability was limited to certain economic offences on the basis of article 15 of the Economic Offences Act (hereafter: EOA). Since 1976, when article 51 DPC in its current form came into force, this limitation no longer applies.<sup>13</sup> The Explanatory Memorandum explains that it is complex to maintain a distinction between various offences, including the international crimes as stated in the ICA, because there are no standards on the basis of which a proper distinction could be made.<sup>14</sup>

That being said, the exact mode of establishing corporate criminal liability differs according to the type of offence. In respect of more serious offences (*misdrijven*), the DPC requires proof of both *actus reus* and *mens rea*. However, for lighter offences - misdemeanours or

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<sup>9</sup> *Kamerstukken II 1975/76*, 13655, 3, 19.

<sup>10</sup> M Hornman & E Sikkema, 'Corporate Intent: In Search of a Theoretical Foundation for Corporate *Mens Rea*', in F de Jong, JAE Vervaele, MM Boone, C Kelk, FAMM Koenraad, FGH Kristen, D Rozenblit & E Sikkema (eds), *Overarching views of delinquency and deviancy- rethinking the legacy of the Utrecht School* (Eleven International Publishers 2015) 297.

<sup>11</sup> M Hornman, *De strafrechtelijke aansprakelijkheid van leidinggevend van ondernemingen. Een beschouwing vanuit multidimensionaal perspectief* (diss. UU) ( Boom Juridisch 2016); L Enneking e.a., *Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen, Een rechtsvergelijkend en empirisch onderzoek naar de stand van het Nederlandse recht in het licht van de UN Guiding Principles* ( Boom Juridische Uitgevers 2016) 140.

<sup>12</sup> *ibid* 292.

<sup>13</sup> R van Elst, *Strafbare rechtspersonen en hun leidinggevers* (Nijmegen Ars Aequi Libri 1997) 9; art 15 Economic Offences Act.

<sup>14</sup> J de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* (vierde druk) (Deventer Kluwer 2009) 163.

contraventions - it is generally sufficient for the public prosecutor to prove only the existence of *actus reus* in order to establish corporate criminal liability.<sup>15</sup>

### 3.1.2 Procedural Law governing criminal prosecution and relevant actors (prosecution and authorities, victims, NGOs, courts)

#### *Procedural framework for prosecuting a corporation*

The Dutch procedural framework for prosecuting a corporation is laid down in Title VI of Book 4 of the Dutch Code of Criminal Procedure (hereafter: DCCP) (articles 528-532 DCCP). Although this is not directly clear from the wording of the DCCP, the normal criminal procedure applicable to the prosecution of individuals also extends to corporations.<sup>16</sup> A corporation is regarded as a suspect from the moment that there is a reasonable suspicion that criminal activity is taking place within the corporation.<sup>17</sup>

When the corporation is prosecuted, it is represented in court by the director, or in case there are multiple directors, by one of them.<sup>18</sup> The DSC has clarified that the corporation may decide to be represented by more directors at the same time.<sup>19</sup> The judge has the right to demand the personal appearance of a particular director.<sup>20</sup> The representative of the corporation has the right to remain silent.<sup>21</sup> Trial information is communicated to the defendant, which is done by delivering it to the residence or to the place of office of the corporation or to the residence of one of the directors of the corporation.<sup>22</sup>

As far as the commission of core crimes under the International Crimes Act (ICA) is concerned, to which the aforementioned article 51 DPC on corporate liability also applies, the National Prosecutor (*Landelijk Parket*) has exclusive jurisdiction to prosecute.<sup>23</sup> The District Court in The Hague is the sole competent court to hear these cases.<sup>24</sup> The procedural rules applicable to ICA prosecutions are complementary to the procedural rules which are laid down in the DCCP.<sup>25</sup> However, prosecutions for ICA crimes are not time-barred.<sup>26</sup> The ICA prohibits the prosecution of persons enjoying personal immunity – notably foreign

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<sup>15</sup> BF Keulen & E Gritter, 'Corporate Criminal Liability in the Netherlands', in M Pieth, R Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence and Risk* (Springer 2011) 184.

<sup>16</sup> A Minkenhof's, *Nederlandse Strafvordering*, elfde druk Prof. mr. JM Reijntjes (ed) (Kluwer 2009) 561.

<sup>17</sup> art 27 Dutch Code of Criminal Procedure.

<sup>18</sup> art 528(1) Dutch Code of Criminal Procedure.

<sup>19</sup> HR 26 januari 1988, *NJ* 1988/ 815.

<sup>20</sup> art 528(3) Dutch Code of Criminal Procedure.

<sup>21</sup> HR 13 oktober 1981, *NJ* 1982/17.

<sup>22</sup> art 529(1) Dutch Code of Criminal Procedure.

<sup>23</sup> C Cleiren, J Nijboer, D Paridaens-van der Stoel, *Internationaal Strafrecht Tekst & Commentaar* (Kluwer 2009) 1538.

<sup>24</sup> art 15 International Crimes Act designates the court in The Hague as the competent court, except for the competence of the judge designated by the Act Military Criminal Law.

<sup>25</sup> In para 4 (more specific in art 10 – art 16) of the ICA general rules of criminal procedural law are laid down.

<sup>26</sup> art 13 International Crimes Act, except for crimes as mentioned in article 7(1) and as far those crimes relate to the crimes mentioned in article 9 International Crimes Act, retrieved from: <<http://wetten.overheid.nl/BWBR0015252/2006-01-01>> last reviewed 31 May 2016.

heads of state, governmental leaders and ministers of foreign affairs - but this limitation will obviously not apply to prosecutions of corporations.

A 'Protocol for the treatment of complaints under the International Crimes Act' (hereafter: Protocol) sets out more specific rules for the prosecution of crimes under the ICA.<sup>27</sup> The Protocol states that several factors should play a role in taking a decision regarding whether there is a sufficient and realistic prospect that a successful investigation and prosecution can be brought within a reasonable time. These factors include relevant treaties, the possibility of safely carrying out missions in relevant foreign countries, and the chance of collecting a sufficient amount of evidence, taking into account the willingness of witnesses and foreign countries to cooperate with the Netherlands.<sup>28</sup>

*Are there special rules, especially for fact-finding?*

The general framework of rules concerning fact-finding is laid down in the DCCP. Additional rules are laid down in statutes concerned with specific crimes, such as the ICA and EOA.

The investigation of ICA crimes is conducted by the National Criminal Investigation Department of the National Police Agencies (*Korps Landelijke Politiediensten*).<sup>29</sup> Possibilities of investigating on foreign territory may be limited, the cooperation of foreign authorities may not be forthcoming, and witnesses may be hard to find.<sup>30</sup>

The investigation of offences under the EOA is governed by the framework as laid down in the DCCP. Pursuant to the EOA, investigators are entitled to seize property when this is in the interest of the investigation.<sup>31</sup> Investigators have the competence to access any place and to request data inspection if this is reasonably required for the fulfilment of their task and to make copies of these data.<sup>32</sup>

One respondent elaborated on the process of fact-finding regarding core crimes involving corporations. In order to find evidence, the DPPO investigates the total volume of import and export products of a certain corporation. As to export products, the respondent referred to the *Van Anraat* case, explaining that Van Anraat exported products which were used to create chemical weapons, which were in turn used to commit war crimes. Van Anraat was fully aware of the eventual use of the products sold. As to import products, the respondent referred to investigations with respect to the Democratic Republic of Congo (DRC). In the DRC, several mining areas are controlled by militias, which plunder mines and use mining

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<sup>27</sup> Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet Internationale Misdrijven, *Stcr.* 2011, 22803, 1.

<sup>28</sup> Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet Internationale Misdrijven, *Stcr.* 2011, 22803.

<sup>29</sup> C Cleiren, J Nijboer, D Paridaens-van der Stoel, *Internationaal Strafrecht Tekst & Commentaar* (Kluwer 2009) 1538.

<sup>30</sup> M Wijers, K Lünemann, R Haveman, S ter Woerds, J Timmer, *Evaluatie Plan van Aanpak opsporing en vervolging oorlogsmisdrijven* (Verwey-Jonker Instituut 2005) 32.

<sup>31</sup> art 18(1) Economic Offences Act.

<sup>32</sup> arts 19, 20 Economic Offences Act.

proceeds to engage in conflict in the course of which war crimes are committed. When mineral ores are imported by a Dutch corporation which is aware of the origin of the ores, and the use of the proceeds, the corporation may possibly be complicit in war crimes. In order to establish knowledge on the part of the corporation, the DPPO has to closely investigate complex 'intermediate markets' (*tussenmarkten*) for mineral ores.<sup>33</sup>

*Is it possible to try a corporation (or individual) in absentia?*

As indicated above, on the basis of article 528 DCCP a corporation is represented in the proceedings by the director, or in case there are more directors by one of them.<sup>34</sup> This also applies to international crimes under the ICA.

## 3.2 Principles of Jurisdiction/Building the nexus – in a nutshell

### 3.2.1 Defining jurisdiction – in a nutshell

The rules of jurisdiction in Dutch criminal law are laid down in articles 2 to 7 of the Dutch Penal Code (hereafter: DPC). These articles provide for territorial and extraterritorial criminal jurisdiction. As far as extraterritorial jurisdiction is concerned, they provide in particular for active and passive personality jurisdiction. However, passive personality jurisdiction only pertains to crimes that are punishable by at least eight years in prison and that are punishable in the State of commission.<sup>35</sup> The passive personality principle also extends to aliens with permanent residence in the Netherlands.<sup>36</sup>

After the ratification of the Statute of the International Criminal Court, the Dutch government introduced a new law on international core crimes, the aforementioned International Crimes Act (hereafter: ICA). The ICA allows for the exercise of extraterritorial and even universal jurisdiction.<sup>37</sup>

## 3.3 International law/Human rights framework

In prosecuting core crimes or treaty crimes, the Netherlands is bound by the rules of the broad range of international conventions and treaties it is party to. The framework of these sources of law - relevant international treaties - will be set out below, with a specific table for the UN human rights treaties.

### 3.3.1 Core crime conventions

#### *Geneva Conventions on the Laws of War*

The Netherlands is a party to the Geneva Conventions on the Laws of War and its two Additional Protocols. These conventions provide for universal jurisdiction: respectively

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<sup>33</sup> Public prosecutor working within the field of international crimes.

<sup>34</sup> art 528(1) Dutch Code of Criminal Procedure.

<sup>35</sup> art 5(1) of the Dutch Penal Code. In 2013 the DPC was revised in this respect. *Kamerstukken II* 2012/13, 33572, 1.

<sup>36</sup> art 5(2) of the Dutch Penal Code.

<sup>37</sup> The adoption of the law also allowed for the prosecution of crimes against humanity under the universality principle. This was not possible before. *Kamerstukken II* 2001/02, 28337, 3.

articles 49,50, 129 and 146 of the four conventions require states to search for alleged offenders 'regardless of their nationality'.<sup>38</sup>

### *Rome Statute*

The Netherlands is a party to the Rome Statute establishing the International Criminal Court (hereafter: ICC).<sup>39</sup> The ICA provides for universal jurisdiction over the core crimes listed in the ICC Statute.<sup>40</sup>

### *Convention on the Prevention and Punishment of the Crime of Genocide*

The Netherlands is a party to the Convention on the Prevention and Punishment of the Crime of Genocide, since 1966.

#### 3.3.2 *Conventions dealing with treaty crimes*

##### *UN Convention against Corruption (UNCAC)*<sup>41</sup>

The Netherlands is a party to the UNCAC which entered into force on the 30<sup>th</sup> of November 2006.<sup>42</sup> Article 42 (1) sub a of the UNCAC provides for territorial jurisdiction, including, in article 42(1) sub b, jurisdiction on the basis of the flag principle. Furthermore, article 42 (2) offers states the possibility to establish jurisdiction on the basis of the passive (sub a) and active (sub b) nationality principle.

##### *UN Convention against Transnational Organised Crime (UNTOC)*<sup>43</sup>

The Netherlands is a party to the UNTOC and its protocol (which is aimed at preventing, suppressing, and punishing trafficking in persons), the separate Convention on Action against Trafficking in Human Beings of the Council of Europe, and the International Labour Organization conventions concerning child labour and working conditions.<sup>44</sup> Article

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<sup>38</sup> art 49 of Geneva Convention I; Article 50 of Geneva Convention II; art 129 of Geneva Convention III; Article 146 of Geneva Convention IV. It is also cited by the International Committee of the Red Cross as being part of Customary International Humanitarian Law (rule 158); International Committee of the Red Cross, *Universal jurisdiction over war crimes*, <<https://www.icrc.org/eng/assets/files/2014/universal-jurisdiction-icrc-eng.pdf>> last reviewed 1 September 2016.

<sup>39</sup> The Netherlands signed the Rome Statute during the conference that formed the basis for this Statute in 1998 and subsequently ratified it on 17 July 2001.

<sup>40</sup> *Kamerstukken II* 2011/12, 32475, 3; *Kamerstukken II* 2002/03, 28337, 17.

<sup>41</sup> 'United Nations Convention against Corruption', *United Nations Office on Drugs and Crime*, retrieved from: <[https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf)> last reviewed 31 May 2016.

<sup>42</sup> 'Verdrag van de Verenigde Naties tegen corruptie', *Verdragenbank Overheid* <<https://verdragenbank.overheid.nl/nl/Treaty/Details/010077.html>> last reviewed 18 August 2016.

<sup>43</sup> United Nations Office on Drugs and Crime, *United Nations Convention against Transnational Organized Crime and the Protocols thereto*, <[https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED\\_NATIONS\\_CONVENTION\\_AGAINST\\_TRANSNATIONAL\\_ORGANIZED\\_CRIME\\_AND\\_THE\\_PROTOCOLS\\_THERETO.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf)> last reviewed 31 May 2016.

<sup>44</sup> Slavery Convention (1926) (League of Nations); Forced Labour Convention (1930); Protection of Wages Convention (1949); Abolition of Forced Labour Convention (1957); Minimum Age Convention (1973); Worst Forms of Child Labour Convention (1999).

15 (1) sub a of the UNTOC provides for territorial jurisdiction, including in sub b jurisdiction based on the flag principle. Article 15 (2) sub a UNTOC provides for jurisdiction on the basis of the passive nationality principle and sub b the active nationality principle.

### *UN Torture Convention*

The Netherlands ratified the Convention against Torture at the end of 1988. In 2002, an optional protocol - in which the acceptance of control mechanisms is regulated - was added to the convention, which the Netherlands ratified in 2010.<sup>45</sup> Article 5 (1) sub a of the UN Torture Convention provides for territorial jurisdiction, sub b for jurisdiction based on the active nationality principle, and sub c based on the passive nationality principle. Section 5 (2) provides for presence-based universal jurisdiction.

*OECD Convention on Combatting Bribery of foreign public officials in international business transactions (OECD Anti-Bribery Convention).*

The OECD Anti-Bribery Convention<sup>46</sup> is implemented in Dutch legislation since the 1<sup>st</sup> of February 2001.<sup>47</sup> Article 4 sub 1 of the Convention provides for territorial jurisdiction, and sub 2 provides for jurisdiction on the basis of the active nationality principle when a Dutch national or a Dutch corporation is guilty of bribing a foreign official, even when all illegal activities took place outside the territory of the Netherlands.<sup>48</sup>

### 3.3.3 *Human Rights Treaties*

There are nine major UN human rights treaties. The Netherlands can be regarded as a strong advocate for human rights. In 2012, it established an 'Institute for Human Rights' (*College voor de rechten van de mens*), with the aim of promoting human rights, increasing awareness of these rights among Dutch citizens and promoting their observance. The Institute operates in conformity with the Paris Principles and has maintained an "A" accreditation status.<sup>49</sup>

The Netherlands is a party to seven of the nine UN human rights treaties which are set out in the following table:

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<sup>45</sup> 'Naleving van het Verdrag tegen Foltering in Nederland', *Nederlandse Vereniging voor de Verenigde Naties*, <<http://www.nvvn.nl/artikel/naleving-van-het-verdrag-tegen-foltering-in-nederland/>> last reviewed 1 August 2016.

<sup>46</sup> Organisation for Economic Co-operation and Development, *Convention on combatting bribery of foreign public officials in international business transactions* <[https://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)> last reviewed 12 August 2016.

<sup>47</sup> 'Nederland doet meer tegen buitenlandse omkoping', *Rijksoverheid*, <<https://www.rijksoverheid.nl/actueel/nieuws/2013/01/08/nederland-doet-meer-tegen-buitenlandse-omkoping>> last reviewed 12 August 2016.

<sup>48</sup> G Smid, *Internationale corruptiebestrijding in Nederland*, TvCo 2016/03, p 115

<sup>49</sup> International Coordinating Committee of National Institutions for the promotion and protection of human rights (ICC), *Chart of the status of national institutions. Accreditation status as of 23 May 2014* <<http://nhri.ohchr.org/EN/Documents/Accreditation%20Status%20Chart.pdf>> last reviewed 31 May 2016.

Treaty	Signed	Ratified
<b>International Covenant on Civil and Political Rights</b>	25 Jun 1969	11 Dec 1978
<b>International Covenant on Economic, Social and Cultural Rights</b>	25 Jun 1969	11 Dec 1978
<b>Convention on the Elimination of All Forms of Discrimination against Women</b>	17 Jul 1980	23 Jul 1991
<b>International Convention on the Elimination of All Forms of Racial Discrimination</b>	24 Oct 1966	10 Dec 1974
<b>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</b>	4 Feb 1985	21 Dec 1988
<b>International Convention on the Protection of All Persons from Enforced Disappearance</b>	29 Apr 2008	23 Mar 2011
<b>Convention on the Rights of the Child</b>	26 Jan 1990	6 Feb 1995

The human rights conventions, with the exception of the UN Torture Convention, do not confer jurisdiction over international crimes. However, procedural human rights guarantees, such as the right to a fair trial, are obviously relevant to international crimes prosecutions. In addition, the treaties impose, or may be considered to impose, positive obligations on the Member States, which may include the establishment of jurisdiction to guarantee victims' right to a remedy. It is unclear, however, to what extent international human rights law requires states to establish *extraterritorial* jurisdiction.

The two main treaties that have not been ratified by the Netherlands are the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of Persons with Disabilities. The first convention has not been signed, due to the granting of the same rights to illegal residents as those residing lawfully.<sup>50</sup> The latter convention was signed in 2007, but has not yet been ratified. This is mainly due to practical reasons relating to legislation which has to be changed and costs which have to be made regarding the performance of treaty obligations.<sup>51</sup>

### 3.3.4 *Soft law mechanisms relevant to corporate social responsibility*

Besides conventions, there are a significant number of soft law mechanisms that are in place and used by the Netherlands in order to prevent core and treaty crimes. One of the most prominent instruments for our purposes are the UN Guiding Principles on business and

<sup>50</sup> National Report submitted by The Netherlands in 2012 to the Human Rights Council for the Working Group on the Universal Periodic Review at 8. Document no. A/HRC/WG.6/13/NLD/1.

<sup>51</sup> 'Mission and Ambition', *College voor de rechten van de mens*, <<https://www.mensenrechten.nl/mission-and-ambition>> last reviewed 14 August 2016.

human rights (also known as the Ruggie Principles).<sup>52</sup> These Principles, even though they are not binding, have led to the adoption of new policies on both the European and the national level. According to the Principles, Dutch corporations ought to respect human rights in the course of their worldwide activities, and the Dutch government has to offer redress in case of violations.

The Netherlands also supports the OECD Guidelines on Multinational Corporations, and on that basis has established a so-called National Contact Point (*Nationaal Contactpunt*).<sup>53</sup> Also, the Dutch government stimulates corporate social responsibility, by establishing knowledge networks and providing financial support for relevant initiatives.<sup>54</sup>

### 3.4 Framework for Prosecuting a Cross-Border Case

To build a cross border-case, the first step is to find information which leads to a suspicion of a crime. In cases where sufficient information is available, the second step is to conduct an investigation, aimed at gathering evidence. When this investigation yields sufficient evidence, the third step is a decision by the public prosecutor on whether or not to prosecute and to bring the case before a (trial) court.

#### 3.4.1 *From information to prosecution*

The information usually is collected by the police through their own investigation or through citizens informing the police of a (suspected) crime. One of the respondents explains that there are no specific policy regulations governing this so-called ‘start information’ (*startinformatie*). Accordingly, this belongs to the public prosecutor’s freedom of investigation. Both respondents indicated, however, that in cases concerning international crimes, information regularly comes from NGOs.<sup>55</sup> In offering information, NGOs often demand that the source of information be protected, meaning that no personal data about the source may be included in the criminal file. The DCCP offers a possibility to accommodate such demands (namely on the basis of article 187d in conjunction with article 149b DCCP).

During the interview, one of the respondents cited the need for enhanced dual-use goods consultations, which are currently held between the Ministry of Foreign Affairs and the Dutch customs authorities on the basis of the Sanctions Act. In these consultations, parties discuss ways to deal with dual-use goods, *i.e.*, goods that can be used for both civilian and military applications. As these goods could also be used to commit international (war) crimes, it is advisable to also inform the public prosecutor responsible for international

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<sup>52</sup> United Nations Human Rights – Office of the High Commissioner, *Guiding principles on business and human rights* <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> last reviewed 14 August 2016.

<sup>53</sup> Nationaal Contactpunt (NCP) Nederland <<https://www.oesorichtlijnen.nl/ncp>> last reviewed 14 August 2016.

<sup>54</sup> Dutch Government on Corporate Social Responsibility on its website. <<https://www.rijksoverheid.nl/onderwerpen/maatschappelijk-verantwoord-ondernemen/inhoud/maatschappelijk-verantwoord-ondernemen-in-de-praktijk>>.

<sup>55</sup> Public Prosecutors working in the field of international criminal law.

crimes prosecutions of the content of these consultations. The respondent explained that sometimes the prosecutor just happens to find information about possible international crimes by reading the Parliamentary Questions. Accordingly, due to the current lack of information exchange, cases of corporate involvement in international crimes may not be detected.

When there is a sufficient amount of “start information” the public prosecutor can conduct an investigation.<sup>56</sup> One of the respondents explained how an investigation concerning cross-border corporate crime is, or should be, carried out in practice. The most crucial issue is to obtain documents regarding the administration of the corporation, more specifically the minutes of meetings.

The respondents explain that, in making the decision whether or not to prosecute, they take several factors into account such as the feasibility of a case, the possibilities to conduct an investigation, the availability of, and access to, evidence in foreign countries, the safety of witnesses, and the possibility of doing independent research in foreign countries.

#### 3.4.2 *Rules governing the investigation*

The investigation is primarily governed by rules laid down in the Dutch Code of Criminal Procedure (hereafter: DCCP). However, when an investigation is focused on certain specific crimes, such as international crimes, additional rules have to be taken into account which are laid down in separate acts such as the International Crimes Act (hereafter: ICA) or the Economic Offences Act (hereafter: EOA).

#### 3.4.3 *International Crimes*

When building a case concerning an international crime there are complementary rules to the DCCP, laid down in the International Crimes Act (hereafter: ICA). A Protocol sets out specific rules for the prosecution of crimes laid down in the ICA.<sup>57</sup> The National Prosecutor decides on the basis of a report whether or not to undertake a prosecution. In making this decision, he notably inquires whether there is sufficient information to treat the case as a reasonable *prima facie* case and whether there is a reasonable prospect of a successful prosecution.<sup>58</sup>

#### 3.4.4 *Crimes of corruption*

In building a cross-border case concerning corruption, the DPC provides competence to the Dutch Public Prosecutor’s Office (DPPO) to prosecute corporations. Corporations can be prosecuted for actively bribing a civil servant or judge on the basis of article 177, 177a and, 178 DPC, by offering them a gift (*actieve omkoping*). When a civil servant or judge is being bribed by accepting a gift, they also can be prosecuted for passive bribery (*passieve omkoping*)

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<sup>56</sup> art 132 Dutch Code of Criminal Procedure; the public prosecutor is competent to start a preliminary investigation on the basis of art 141 Dutch Code of Criminal Procedure.

<sup>57</sup> Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet Internationale Misdrijven, *Stert.* 2011, no 22803, 1.

<sup>58</sup> Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet Internationale Misdrijven, *Stert.* 2011, no 22803, 3.

on the basis of article 362, 363, and 364 DPC.<sup>59</sup> Although corruption is criminalized in the DPC, the specific word 'corruption' cannot be found in this code. In the search for one definition of corruption, a unique answer is hard to find. Corruption is dependent on several factors such as the culture of a particular country. Whether corruption exists often depends on the particular facts of a case (*'dat ligt eraan'*).<sup>60</sup> Per the decision in *Drijfmest*, a corporation can be prosecuted for corruption when the actions of the person working for the corporation fall 'within the sphere' of the corporation.<sup>61</sup>

The justification for extraterritorial jurisdiction over corruption is economic: increased globalization only works adequately when there is an international 'level playing field' for cross-border business practices.<sup>62</sup> To support corporations in preventing corruption and moreover to inform them about the specific instances in which they contravene the rules on corruption, the OECD established guidelines.<sup>63</sup>

#### 3.4.5 *Authorities which are concerned with the task of investigation*

The DPPO is a national organization which is active in ten districts within the Netherlands. In addition to these institutions, there is a specific authority named 'The National Office' (*Landelijk Parket*) and an authority named 'The Functional Office' (*Functioneel Parket*), both of which are charged with specific tasks of investigation.

##### *Authorities concerned with international crimes*

The Protocol for the treatment of complaints under the International Crimes Act designates the National Prosecutor (*Landelijk Parket*) in Rotterdam as the sole authority responsible for ICA crimes.<sup>64</sup> As far as the prosecution of international crimes is concerned, the National Prosecutor cooperates with the Team International Crimes of the Criminal Investigation Department.<sup>65</sup>

##### *Authorities concerned with crimes of corruption*

As far as the prosecution of corruption is concerned, a distinction is made between law-enforcement agencies and anti-corruption agencies. The latter agencies - 'the National Office for Promoting Ethics & Integrity in the Public Sector' and 'The Integrity Bureau' - carry out

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<sup>59</sup> Aanwijzing opsporing en vervolging buitenlandse corruptie, *Stcrt* 2012, 26939, <<https://zoek.officielebekendmakingen.nl/stcrt-2012-26939.html>> last reviewed 31 May 2016.

<sup>60</sup> JH Maat, 'Buitenlandse corruptie en de aanpak door de Rijksrecherche', in: WODC, *Justitiële Verkenningen, Ambtelijke corruptie* (Boom Juridische Uitgevers 2005) 66.

<sup>61</sup> HR 21 oktober 2003, ECLI:NL:HR:2003:AF7938.

<sup>62</sup> FGH Kristen, 'Maatschappelijk verantwoord ondernemen en strafrecht', in: AJAJ Eijsbouts & JM. de Jongh (eds), *Maatschappelijk verantwoord ondernemen (Handelingen Nederlandse Juristenvereniging 2010)* (Kluwer 2010) 144.

<sup>63</sup> Nationaal Contactpunt OESO-richtlijnen, *OESO-guidelines: Combatting Corruption*, <<http://www.oeso-richtlijnen.nl/oeso-richtlijnen/c/corruptiebestrijding>> last reviewed 31 May 2016.

<sup>64</sup> Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet Internationale Misdriven, *Stcrt*. 2011, no 22803, 1.

<sup>65</sup> 'Internationale Misdriven', *Openbaar Ministerie*, <<https://www.om.nl/onderwerpen/internationale/>> last reviewed 31 May 2016.

tasks to prevent corruption in accordance with article 6 UNCAC.<sup>66</sup> The competence to investigate and prosecute crimes of corruption lies with the DPPO. The National Police Internal Investigations Department (*Rijksrecherche*) is the department within the DPPO which is the competent agency to investigate suspicions of corruption.<sup>67</sup> The competent office to prosecute crimes of corruption is the National Office (*Landelijk Parket*), based in Rotterdam. Within this national office, a specific public prosecutor is appointed, specialised in crimes of corruption.

#### *Authorities concerned with economic crimes*

On the basis of article 10(1) Sanctions Act, civil servants of the National Tax Agency (*Rijksbelastingdienst*), of the Tax Agency of the Ministry of Finance (*Belastingdienst van het Ministerie van Financiën*), of the General Inspection Agency (*Algemene Inspectiedienst*), and of the Cultural Heritage Inspection of the Ministry of Education, Culture and Science (*Erfgoedinspectie van het Ministerie van Onderwijs, Cultuur en Wetenschappen*), as well as commanders of Dutch war ships, have competence to monitor compliance with the Sanctions Act.<sup>68</sup> On the basis of article 10(2) Sanctions Act, the Minister of Finance is competent to appoint persons with the task of monitoring corporations' compliance with the rules laid down in the financial part of the Sanctions Act. *De Nederlandsche Bank* (DNB) received competence to monitor financial corporations who, on the basis of the 'Act Financial Monitoring' (*Wet op het Financieel Toezicht*), can carry out the business of a bank, the business of an exchange adjustment, the business of insurance, or the business of a payment service in the Netherlands.<sup>69</sup> Furthermore, they can monitor the retirement funds as mentioned in article 1 of the 'Retirement Act' (*Pensioenwet*) and the funds for job retirement as laid down in article 1 of the 'Act Mandatory Job Retirement Ruling' (*Wet Verplichte Beroepspensioenregeling*). The AFM (*Stichting Autoriteit Financiële Markten*) is the competent authority to monitor compliance of the rules by financial corporations who, on the basis of the 'Act Financial monitoring', can offer rights of participation in an investment fund or can be the administrator of such a fund or can grant investment services.<sup>70</sup>

### 3.5 Prominent cases, media coverage

This section contains an overview of some leading Dutch cases concerning the prosecution of corporations for violations of international law, or at least for transboundary crimes.

#### *The Trafigura Case*

A prominent example of the prosecution of a corporation for violations abroad is the Trafigura Group case. The corporation Trafigura, with offices in London, Amsterdam, and

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<sup>66</sup> W Slingerland, F Eijkelhof, van Hulst, O Popovych, J Wempe, 'National Integrity System Assessment The Netherlands', Transparency International [2012] 198.

<sup>67</sup> 'Wat doet de Rijksrecherche' <<http://www.rijksrecherche.nl/organisatie/doet-rijksrecherche/>> last reviewed 10 August 2016.

<sup>68</sup> art 1 Regeling toezichthoudende ambtenaren Sanctions Act 1977.

<sup>69</sup> art 10(2) sub a, c, f, j. Sanctions Act; R Van Elst, 'Commentaar op artikel 10 Sanctiewet 1977', in DJMW Paridaens, PAM Verrest (eds.), *Tekst & Commentaar Internationaal Strafrecht* (Kluwer 2015).

<sup>70</sup> art 10(2) sub b,d Sanctions Act.

Geneva, was accused of dumping waste, originating from the ship Probo Koala, in the harbour in Ivory Coast in 2006. This did not only lead to environmental damage, but it had a great health impact on the inhabitants and even caused deaths. These actions of Trafigura led to a number of judicial claims in different countries. In the Netherlands, the DPPO started an investigation, solely focusing on the activities of Trafigura within the Netherlands. This investigation eventually resulted in a prosecution and trial. In 2010, the District Court of Amsterdam convicted Trafigura for exporting waste with the ship Probo Koala to Ivory Coast being aware of the fact that these substances were harmful to life and health.<sup>71</sup> Trafigura was sentenced to a payment of 1 million euro for violating two provisions of Dutch law. Firstly, Trafigura had violated the regulation laid down in article 10.60 sub 5 of the 'Law of Environmental Management' (*Wet Milieubeheer*), by exporting slops from Amsterdam to Ivory Coast. Violation of this regulation is punishable on the ground of article 1a sub 2 jo. article 2 sub 1 of the Economic Offences Act (hereafter: EOA). Secondly, Trafigura had violated article 174 Dutch Penal Code (hereafter: DPC), because it had delivered gravely polluted slops to Amsterdam Port Services while concealing the harmfulness of the substances.

Both the DPPO and Trafigura appealed the decision of the District Court of Amsterdam. In 2012, the Amsterdam Court of Appeal confirmed the District Court's decision.<sup>72</sup> Again, both the DPPO and Trafigura appealed, but the case was never brought before the Dutch Supreme Court as Trafigura and the DPPO reached a settlement for an amount of 1.3 million euro.<sup>73</sup>

Trafigura was not prosecuted, however, for the crimes committed on the territory of Ivory Coast. Greenpeace filed a complaint against this decision, but it was dismissed by the Hague Court of Appeal on the grounds that the DPPO did not have a complete criminal file and the authorities of Ivory Coast did not respond to requests to conduct criminal investigation on their territory.<sup>74</sup> The defendants, for that matter, pleaded that the Netherlands did not have jurisdiction to prosecute Trafigura for the crimes committed in Ivory Coast, as the Dutch Trafigura corporation, a holding company, could not be qualified as a Dutch legal person at that time. According to the defendants, the corporation may have been incorporated in the Netherlands, but its main activities were taking place from the United Kingdom and Switzerland.<sup>75</sup> The Court of Appeal did not address the jurisdictional question in detail, although it stated that it could not readily be assumed that the Dutch judge would accept jurisdiction over offences committed in Ivory Coast.<sup>76</sup>

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<sup>71</sup> Rb. Amsterdam 23 juli 2010, ECLI:NL:RBAMS:2010:BN2149, r.o. 10.

<sup>72</sup> Hof Amsterdam, 23 december 2011, ECLI:NL:GHAMS:2011:BU9237, r.o. 8.

<sup>73</sup> M Willems, Justitie schikt met Trafigura in Probo Koala-zaak, *NRC.nl* 16 november 2012<<https://www.nrc.nl/nieuws/2012/11/16/justitie-schikt-met-trafigura-in-probo-koala-zaak-a1439934>> last reviewed 2 September 2016.

<sup>74</sup> Hof 's-Gravenhage 12 april 2011, ECLI:NL:GHSGR:2011:BQ1012.

<sup>75</sup> Hof 's-Gravenhage 12 april 2011, ECLI:NL:GHSGR:2011:BQ1012 under 16; J van Kleef, H Smits, M van Geest, *Het Belastingparadijs*, (Amsterdam Atlas Contact 2013).

<sup>76</sup> Hof 's-Gravenhage 12 april 2011, ECLI:NL:GHSGR:2011:BQ1012, r.o. 3.1.

In early 2016, victims of the Probo Koala filed a (tort) claim against Trafigura before a Dutch court. The proceedings were instituted by the foundation 'Victimes des Déchets Toxiques Côte d'Ivoire', which includes 25 victim organizations.<sup>77</sup>

A tort claim against Trafigura was also brought in England, on behalf of 15,000 victims. The claim cited that Trafigura exported waste being aware of the harmfulness of the substances. The claim resulted in Trafigura making payments to the victims. The case was never brought before the court, as the case ended in a settlement, for the high amount of £30 million.<sup>78</sup>

If anything, the Trafigura case has triggered calls for corporations to act more responsibly in host countries.<sup>79</sup>

#### *Prosecutor v. Van Anraat*

The Van Anraat case concerned a Dutch businessman, Frans van Anraat, who was prosecuted for conspiracy to commit genocide and to commit war crimes. Van Anraat was the sole supplier of the chemical 'thiodiglycol' and delivered it to the regime of Saddam Hussein. The chemical is the predominant component in the production of mustard gas, which was used by Hussein's military for gas attacks during the war between Iraq and Iran in 1988. The District Court of The Hague dismissed the charge of complicity to genocide, but convicted the accused of complicity in war crimes on the basis of article 8 Wartime Offences Act and article 48 DPC.<sup>80</sup> This conviction was upheld by the Supreme Court.<sup>81</sup>

In this case, 16 victims joined the procedure to claim damages.<sup>82</sup> The Court of Appeal of The Hague<sup>83</sup> declared these claims inadmissible, however, on the ground that they were not 'easy in nature', *i.e.*, the admissibility criterion for joining a procedure to claim damages (at least until the end of 2010).<sup>84</sup> In the Court's view, a criminal trial should not be burdened with complex civil cases. The Supreme Court agreed.<sup>85</sup>

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<sup>77</sup> H de Zeeuw, 'Nieuwe massaclaim tegen gifdumping Trafigura', *NRC.nl* 2 maart 2016 <<https://www.nrc.nl/nieuws/2016/03/02/slachtoffers-gifdumping-dienen-nieuwe-massaclaim-in-tegen-trafigura-a1408915>> last reviewed 2 September 2016.

<sup>78</sup> L Roorda, 'Geld stinkt niet, chemisch afval wel: een terugblik op de Probo Koala-zaken', *Ucall blog* 10 november 2015 <<http://blog.ucall.nl/index.php/2015/11/geld-stinkt-niet-chemisch-afval-wel-eeen-terugblik-op-de-probo-koala-zaken/>> last reviewed: 2 September 2016; Amnesty International, *Trafigura: A toxic journey* <<https://www.amnesty.org/en/latest/news/2016/04/trafigura-a-toxic-journey/>> last reviewed 24 October 2016.

<sup>79</sup> L Enneking, F Kristen e.a., *Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen* ( Boom Juridische Uitgevers 2016) 451-453.

<sup>80</sup> Hof Den Haag 9 mei 2007, ECLI:NL:GHSGR:2007:BA4676, r.o. 18.

<sup>81</sup> HR 30 juni 2009, *NJ* 2009/481.

<sup>82</sup> It is of note that pursuant to article 3 of the Act Conflict of Laws Tort Law (*Wet Conflictenrecht Onrechtmatige Daad*) (WCOD), the claims of the victims had to be examined taking into account Iraqi and Iranian law. L Zegveld, 'Slachtoffers van internationale misdrijven in het strafproces', *NJB* 2012, afl. 28, p 1936.

<sup>83</sup> Hof Den Haag 9 mei 2007, ECLI:NL:GHSGR:2007:BA4676, r.o. 18.

<sup>84</sup> The criterion was changed on the 1st of January 2011, when the Act strengthening position of victims of crimes within the criminal law (*Wet versterking positie van slachtoffers van delicten in het strafrecht*) came into force. *Wet van 17 december 2009* (Stb. 2010,1) i.w.t. op 1 januari 2011 (*Stb.* 2010, 792).

<sup>85</sup> HR 30 June 2009, *NJ* 2009/481.

### *Public Prosecutor v. Guus Kouwenhoven*

Guus Kouwenhoven was a Dutch businessman who owned and participated in several companies active in Liberia. These companies were closely linked to the regime of Charles Taylor who was the dictator of Liberia at that time. During the armed conflict in Liberia, the UN Security Council and the Council of the EU passed a resolution, respectively regulation, prohibiting the supply of weapons to Liberia. These legal instruments were subsequently codified in national legislation. In 2005, Kouwenhoven was taken into custody in the Netherlands, as he was suspected of complicity in war crimes in Liberia during the period 2002-2003. Allegedly, he had illegally supplied weapons which were used by soldiers of Charles Taylor to commit atrocities. He was charged with complicity in war crimes and arms smuggling. The District Court in The Hague found him guilty on the latter charge and sentenced him to 8 years' imprisonment. It rejected the war crimes charge.<sup>86</sup> On appeal, both charges were dismissed for lack of evidence.<sup>87</sup> The Supreme Court (DSC) subsequently held that insufficient attention had been paid to the need to put two anonymous witnesses, key to the prosecution case, in a protection programme. Thus, it overturned the verdict of the Court of Appeal.<sup>88</sup> The DSC referred the case back to the Court of Appeal in 's Hertogenbosch. That court, applying the standard of *dolus eventualis*, went on to convict him for complicity in war crimes.<sup>89</sup>

### *Rival*

Corporations can be held criminally liable for (contributing to) international crimes under article 5 of the International Crimes Act (ICA). The most prominent case against a corporation – rather than a businessman (*e.g.*, van Anraat, Kouwenhoven) – under the ICA has been the *Rival* case. This case pertained to the involvement of the Dutch company Lima Holding B.V. in the construction of a security barrier between the West Bank and Israel. After several warnings from the Ministry of Foreign Affairs requesting full termination of any involvement in the construction, the Palestinian NGO Al Haq brought a criminal complaint against the company in the Netherlands. This complaint alleged complicity in war crimes and crimes against humanity committed in the Netherlands and/or the Occupied Palestinian Territories during the period of 2004 to the present by the company Lima Holding B.V. In

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<sup>86</sup> District Court The Hague, 6 June 2006, LJN:AX7098.

<sup>87</sup> Court of Appeal The Hague, 10 March 2008, ECLI:NL:GHSGR:2008:BC6068; Rechtspraak *Vrijspraak in zaak Kouwenhoven* <<https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/Vrijspraak-in-zaak-Kouwenhoven.aspx>> last reviewed 18 August 2016.

<sup>88</sup> Dutch Supreme Court, 20 April 2010, ECLI:NL:HR:2010:BK8132; A Smeulers, 'Tien jaar Wet Internationale Misdrijven – Een evaluatie', *DD* 2014/25, afl. 4, p 277.

<sup>89</sup> Court of Appeal 's-Hertogenbosch, 21 April 2017, ECLI:NL:GHSHE:2017:1760. See for a comment C Ryngaert, 'Dutch Court of Appeal holds businessman liable for complicity in war crimes', UCall Blog, 10 May 2017 <<http://blog.ucall.nl/index.php/2017/05/dutch-court-of-appeal-holds-businessman-liable-for-complicity-in-war-crimes/>> last accessed 4 June 2017.

particular, the complaint referred to contributions by the company to the construction of the security barrier and settlements by Israel in the West Bank'.<sup>90</sup>

In 2013, the prosecutor decided not to bring a case, citing the minimal involvement of the company in the construction of the barrier and the termination of these acts after the filing of the criminal complaint.<sup>91</sup> Moreover, the prosecutor referred to the complexity of these legal questions and the likelihood of an extensive investigation. In his view, such an investigation would not only require a significant amount of resources, but, due to its extraterritorial aspect, would also necessitate the cooperation of the Israeli authorities (which may not be forthcoming).<sup>92</sup>

One of the respondents confirmed the difficulties to find a sufficient amount of evidence in such cases. As he explained, access to the relevant administration was not possible as the information was located at a subsidiary of the corporation in Israel and the Israeli authorities refused to act on requests for legal assistance sent by the Dutch Public Prosecutor.<sup>93</sup> The respondent furthermore noted that this case triggered a public debate in the Netherlands and put other Dutch corporations doing business in foreign states on notice. It even resulted in the withdrawal of several Dutch corporations doing business in the Occupied Palestinian Territories. For instance, the Pension Fund 'PGGM' withdrew its involvement in five Israeli banks because of the latter's involvement with Israeli settlements in the West Bank.<sup>94</sup> Furthermore, the Dutch water company 'Vitens' abandoned its cooperation with the Israeli company Mekorot, whereas 'Royal Haskoning DHV', a consulting engineering firm, ended its involvement in the establishment of a waste water purification instalment in East Jerusalem.<sup>95</sup>

### *SBM Offshore*

International corruption cases have recently garnered significant media attention in the Netherlands. In 2014, an international corruption case was settled between the Dutch Public Prosecutor's Office (hereafter: DPPO) and the Dutch corporation SBM Offshore, in relation to bribery in Angola and Equatorial Guinea and allegedly also in Brazil. SBM Offshore agents had entered and explored new, foreign markets since 2000, in the process bribing

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<sup>90</sup> Böhler Advocaten *Al-Haq/ report of war crimes and crimes against humanity by Ritwal* <<http://www.alhaq.org/images/stories/PDF/accountability-files/Complaint%20-%20English.pdf>> last reviewed: 7 September 2016.

<sup>91</sup> A Smeulders, 'Tien jaar Wet Internationale Misdrijven – Een evaluatie', *DD* 2014/25, afl. 4, p 287.

<sup>92</sup> 'Geen verder onderzoek naar kraanverhuurder', *Landelijk Parket*, 14 mei 2013 <<https://www.om.nl/algemeen/english/@31795/verder-onderzoek/>> last reviewed: 31 May 2016 ; A Smeulders, 'Tien jaar Wet Internationale Misdrijven – Een evaluatie', *DD* 2014/25, afl. 4, p 284.

<sup>93</sup> Thijs Berger, public prosecutor.

<sup>94</sup> J Franke, 'Ethische connecties PGGM', *NIW* 16 januari 2014 <<http://www.niw.nl/ethische-connecties123/>> last reviewed: 7 September 2016.

<sup>95</sup> 'PGGM stopt met Isrealische banken', *NOS.nl*, 8 januari 2014 <<http://nos.nl/artikel/594827-pggm-stopt-met-israelische-banken.html>> last reviewed 7 September 2016.

foreign officials.<sup>96</sup> The case was eventually settled for 240 million USD, a new record for a Dutch corruption case.<sup>97</sup> Although it was a new record, the settlement amount would actually have even been higher, had the DPPO not taken into moderating circumstances. Reasons for this moderation were the fact that SBM Offshore itself draw the public prosecutor's attention to the practices, carried the research out itself, and fully cooperated with the DPPO and the FIOD.<sup>98</sup>

The DPPO considered that it had no jurisdiction to prosecute the natural persons who were involved in the corrupt practices of the corporation SBM Offshore. According to the DPPO, it only has jurisdiction when the criminal conduct took place on Dutch territory or when the suspect is Dutch. This implies that the Netherlands may have jurisdiction over a Dutch(-incorporated) corporation involved in foreign corrupt practices but not over the corporations' employees of foreign nationality who actually committed the crimes abroad.<sup>99</sup>

The case is also pending in Brazil, relating to corrupt practices of SBM Offshore in Brazil, consisting of paying bribes to employees of the company Petrobras to secure contracts.<sup>100</sup> A first settlement was entered into, according to the terms of which SBM is to pay the Brazilian government 163 million USD.<sup>101</sup> The Brazilian Justice department recently rejected this settlement, and SBM is currently waiting for more information.<sup>102</sup>

### *VimpelCom-Case*

Another recent case concerning corruption is the VimpelCom Case. VimpelCom is a Russian-Norwegian corporation headquartered in Amsterdam. The corporation was accused of bribing a local official in order to get access to the telecommunications market of Uzbekistan.<sup>103</sup> According to the DPPO, this practice constitutes bribery of a government official (*ambtelijke omkoping*) and forgery of documents (*valsheid in geschrift*).<sup>104</sup> Although all the illegal activities took place outside the Netherlands, and a subsidiary of VimpelCom (Unitel) had bribed foreign officials, the Netherlands nevertheless had jurisdiction as the headquarters of Vimpelcom are in Amsterdam (on the basis of the active personality principle as laid down in article 7 DPC).<sup>105</sup> In 2016, Dutch and US prosecutors settled with

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<sup>96</sup> SBM Offshore N.V. betaalt US\$ 240.000.000 wegens omkoping, 12 november 2014 <<https://www.om.nl/onderwerpen/ambtelijke-corruptie/@87202/sbm-offshore-betaalt/>> last reviewed 6 September 2016.

<sup>97</sup> Redactie Volkskrant, 'Nederlands bedrijf SBM Offshore betaalt megaschikking van 192 miljoen', *Volkskrant* 12 November 2014.

<sup>98</sup> G Smid, 'Internationale corruptiebestrijding in Nederland', *TvCo* 2016/03, p 117

<sup>99</sup> 'SBM Offshore N.V. betaalt US \$ 240.000.000 wegens omkoping', *Openbaar Ministerie*, 12 november 2014, <<https://www.om.nl/vaste-onderdelen/zoeken/@87202/sbm-offshore-betaalt/>> last reviewed 24 October 2016.

<sup>100</sup> B Nagtegaal, 'Miljoenenschikking SBM Offshore toch niet goedgekeurd', *NRC.nl* 2 september 2016.

<sup>101</sup> R Postma, 'SBM Offshore treft eerste schikking in Brazilië', *NRC.nl* 26 January 2016.

<sup>102</sup> Redactie Volkskrant, 'Justitie Brazilië keurt Petrobras-schikking SBM Offshore af', *Volkskrant.nl* 2 september 2016.

<sup>103</sup> Redactie NRC, 'Grootste ontnemingszaal ooit in Nederland', *NRC.nl* 7 juli 2016.

<sup>104</sup> K van der Togt, D.S. Schreuders, 'Recente ontwikkelingen op het gebied van corruptiebestrijding', *Bb* 2016/19, afl. 7, 79.

<sup>105</sup> G Smid, 'Internationale corruptiebestrijding in Nederland', *TvCo* 2016/03, p 115

VimpelCom for 795 million USD. The Netherlands will receive half of the amount, which is 397 million USD.<sup>106</sup>

All these cases evidence the particular challenges for courts to make a sound evaluation of criminal cases which have occurred in a completely different contexts characterized by different norms and values, and a different geographical, cultural, and social setting.<sup>107</sup>

### 3.6 Statistics

The Team International Crimes (hereafter: TIC) of the Dutch national police office carried out 13 investigations against 23 suspects in the year 2013. In 2014 the TIC carried out 18 investigations<sup>108</sup> and 16 in 2015.<sup>109</sup> However, from the statistics it does not become clear how many of these investigations specifically concerned corporations.<sup>110</sup>

### 3.7 Public debate on Corporate Social Responsibility

The debate on human rights and corporations is ongoing in the Netherlands. For example, the Institute for Human Rights emphasized in its annual report of 2014 the importance for corporations to take into account human rights.<sup>111</sup> Furthermore, in the Human Rights Report 2014 of the Ministry of Foreign Affairs, it is stated that the Netherlands improves the respect of human rights by corporations in accordance with the aforementioned 'Guiding Principles on Business and Human Rights'.<sup>112</sup>

The Netherlands published its national action plan on business and human rights in 2014,<sup>113</sup> which discusses both the expectations of corporations as well as improvements still to be made. One improvement concerns the clarity of Dutch law regarding CSR. This led to a request for more elaborate research on this topic by the Ministry of Foreign Affairs and the Ministry of Security and Justice. The research was carried out on behalf of the latter Ministry's Research and Documentation Centre (*Wetenschappelijk Onderzoeks- en Documentatiecentrum*, WODC) in 2015 by the Utrecht Centre for Accountability and Liability Law (UCALL). The research focused specifically on the duty of care of Dutch companies concerning CSR and also compared it to its neighbouring countries. It concluded that there is currently no specific law in place yet, which obliges corporations to act with due diligence with respect to their own or their subsidiaries' conduct.

In 2002, a platform was created consisting of multiple NGOs that cooperate in order to pursue the corporate social responsibility agenda. This 'MVO Platform' (MVO is Dutch for

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<sup>106</sup> V Van der Boon, 'VimpelCom schikt corruptiezaak voor \$795 mln', *Financieel Dagblad* 18 februari 2016.

<sup>107</sup> L Zegveld and J Handmaker, 'Universal Jurisdiction: State of Affairs and Ways Ahead, A Policy Paper', *International Institute of Social Studies* 2012, 6.

<sup>108</sup> Rapportagebrief Internationale Misdrijven 2014, 29 juni 2015, 4.

<sup>109</sup> Rapportagebrief Internationale Misdrijven 2015, 23 mei 2016, 2.

<sup>110</sup> Rapportagebrief Internationale Misdrijven 2013, 25 september 2014, 2.

<sup>111</sup> Jaarverslag 2014, College voor de Rechten van de Mens, 21.

<sup>112</sup> Mensenrechtenrapportage 2014, Ministerie van Buitenlandse zaken, 31.

<sup>113</sup> Ministerie van Buitenlandse Zaken (April 2014), 'Nationaal Actieplan bedrijfsleven en mensenrechten' <<https://www.rijksoverheid.nl/documenten/brochures/2014/05/28/nationaal-actieplan-bedrijfsleven-en-mensenrechten>> last reviewed 31 May 2016.

CSR) was initiated by twelve NGOs and has grown into a platform of 33 participating organisations. On the Platform's website, its aim is described as "to stimulate, facilitate and coordinate activities of the different organisations in order to reinforce each other's efforts".<sup>114</sup> The MVO platform issues its own statements on issues within the field of CSR.

One of the main NGOs in the Netherlands dealing with the role of corporations is SOMO, the Centre for Research on Multinational Corporations, which in particular, conducts research in this field. It aims at strengthening the position of civil society, workers, and local communities with regard to multinational corporations, by providing information and engaging players such as the boards of these corporations and relevant stakeholders.

## 4 Holding Corporations Accountable – the Jurisdictional Issue

### 4.1 General Jurisdiction/General Aspects of Jurisdiction

#### 4.1.1 General jurisdiction – Generals

Jurisdiction concerns the reach which the State gives to its (criminal) law.<sup>115</sup> It addresses the question as to *where* and *to whom* Dutch criminal law is applicable.<sup>116</sup> The scope of a State's jurisdiction is ordinarily informed by the desire to protect the specific interests of the State, including its nationals.<sup>117</sup>

The general rules concerning jurisdiction in Dutch criminal law are laid down in the Dutch Penal Code (hereafter: DPC), articles 2-8, in conjunction with the 'Decision on International Obligations with regard to Extraterritorial Jurisdiction' (*Besluit internationale verplichtingen extraterritoriale rechtsmacht*).<sup>118</sup> The Dutch Government changed the legal framework concerning jurisdiction on July 1, 2014 when the 'Act on Review of the Rules concerning Extraterritorial Jurisdiction in Criminal Cases' (*Wet herziening regels betreffende extraterritoriale rechtsmacht in strafzaken*) and the aforementioned Decision entered into force. Three rationales informed this change of legal framework: (1) strengthening the protective function of the DPC; (2) removing the distinction between jurisdiction over persons with Dutch nationality and foreigners residing on Dutch territory; and (3) making the rules on jurisdiction more accessible.<sup>119</sup>

Aside from these general rules on jurisdiction, specific rules apply to a number of crimes, in particular crimes related to drugs, economic crimes, military crimes, and international crimes. When a person, whatever his nationality or territorial presence, is suspected of a

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<sup>114</sup> <<http://mvoplatform.nl>> last reviewed 31 May 2016.

<sup>115</sup> HD Wolswijk, *Locus delicti en rechtsmacht* (Gouda Quint 1998) 17.

<sup>116</sup> J de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* (vierde druk) (r Kluwer 2009) 138.

<sup>117</sup> HD Wolswijk, *Locus delicti en rechtsmacht* (Gouda Quint 1998) 17.

<sup>118</sup> *Besluit internationale verplichtingen extraterritoriale rechtsmacht*<<http://wetten.overheid.nl/BWBR0034775/2016-01-01>> last reviewed 31 May 2016.

<sup>119</sup> R Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikel 2 -8', in Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht* (Kluwer 2014).

crime concerning the import of drugs into the Netherlands,<sup>120</sup> Dutch criminal law applies on the ground of harm caused to Dutch society, even if the relevant acts of preparation, participation, or attempt took place on foreign territory.<sup>121</sup> Furthermore, Dutch criminal law applies to military service-members suspected of any criminal act committed outside the Netherlands.<sup>122</sup>

Finally, article 2 of the International Crimes Act (hereafter: ICA) provides not only for active and passive personality-based jurisdiction<sup>123</sup> but also for presence-based universal jurisdiction over international crimes. When neither the alleged perpetrator nor the victim has Dutch nationality, Dutch criminal law applies to anyone who is suspected of a crime laid down in the ICA committed outside the territory of the Netherlands, provided that he is present on Dutch territory (i.e., in the Netherlands or in Bonaire, Saint Eustatius, and Saba) at the time of the initiation of the proceedings.<sup>124</sup> There is no clear definition of the term 'presence'. From the *travaux préparatoires* it can be derived that 'an investigation can start when there exists a grave reason to assume that the suspect is present on Dutch territory'.<sup>125</sup> If the suspect leaves Dutch territory during the period of investigation, jurisdiction continues to apply; the prosecution can proceed and the arrest and extradition of the suspect can be requested.<sup>126</sup>

Even where jurisdiction obtains on the basis of the aforementioned principles, it cannot be exercised in cases where the suspect enjoys international immunity (Art. 8 DPC). However, the Dutch Supreme Court ruled in its decision of 8 July 2008, that rules of immunity directly deriving from international law restrict the application of the DPC.<sup>127</sup>

The jurisdictional principles (art. 2-8 DPC) discussed below also apply to corporations. However, some problems may arise in applying these principles, in particular the nationality and territoriality principles, to corporations. These problems have not yet come up in Dutch case-law, but they have been addressed in (international) doctrine.

When applying the nationality principle, the complexity lies in the determination of the nationality of a corporation, which may be active in multiple states. The Netherlands determines corporate nationality by means of the place of registration rather than the place where the corporation's main activities are carried out. This method is in fact used

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<sup>120</sup> art 13(3) Opium Act. A an act of preparation within the context of smuggling drugs of List I within and without Dutch Territory. B: attempt to or participation in smuggling drugs of List I within and without Dutch Territory.

<sup>121</sup> art 3 Economic Offences Act; R Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8', in Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht* (Kluwer 2014).

<sup>122</sup> arts 4 and 168 of the Military Criminal Code.

<sup>123</sup> art 2(1)(b) and (c) International Crimes Act.

<sup>124</sup> art 2(1)(a) International Crimes Act.

<sup>125</sup> *Kamerstukken II* 2001/02, 28337, 3.

<sup>126</sup> JAC Bevers, 'Commentaar op artikel 2 WIM', in: JAC Bevers, N.M. Blokker, JFL Roording, *Tekst&Commentaar: Internationaal Strafrecht* (Kluwer 2007).

<sup>127</sup> HR 8 juli 2008, *LJN* BC7418, *NJ* 2011/91, r.o. 6.6.

throughout the European Union with a view to guaranteeing the freedom of establishment (article 49 TFEU).

Attribution of jurisdiction under the territoriality principle can be based on several models. Problems do not so much arise when the *locus delicti* is grounded on territorial results (effects) of (foreign) conduct but rather when it is grounded on the corporation's *territorial conduct*. When exactly a corporation's conduct occurs in the Netherlands for jurisdictional purposes is open to debate, even if it is established that corporate liability is based on the attribution of acts of natural persons to the corporation. The different proposed models of attribution of jurisdiction are discussed in Section 2a.<sup>128</sup>

#### 4.1.2 Territorial Jurisdiction

Territoriality can be regarded as the basic principle of criminal jurisdiction.<sup>129</sup> This holds even if the dominance of territoriality as a standard parameter for establishing jurisdiction has been somewhat weakened by the increased importance of the aforementioned principle of proper administration of justice. Dutch doctrine sees the justification for the territoriality principle in the sovereignty of the State, international public order, and practical considerations.<sup>130</sup>

##### *General Legal Framework*

The principle of territorial jurisdiction is laid down in article 2 Dutch Penal Code (hereafter: DPC) and in article 8 of the 'Act on General Provisions' (*Wet Algemene Bepalingen*). These statutory provisions state that the DPC applies to everyone who is suspected of a crime committed on the territory of the Netherlands.<sup>131</sup> The precise boundaries of Dutch territory are based on treaties. Dutch territory includes besides Dutch territory also Dutch internal waters, the territorial sea, and the airspace above its territory.<sup>132</sup>

Dutch law uses the term *locus delicti* to define the place where the crime occurred. In the statute, no rules can be found regarding the determination of the *locus delicti*. In practice, four doctrines have been developed:<sup>133</sup>

- The doctrine of the human behaviour;

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<sup>128</sup> See also A Schneider, 'Corporate Criminal Liability and Conflicts of Jurisdiction', in D Brodowski, M Espinoza de los Monteros de la Parra, K Tiedemann, J Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 255.

<sup>129</sup> J de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* (vierde druk) (Kluwer 2009) 138; AH Klip, A.-S. Massa, *Communicerende Gronden voor Extraterritoriale Rechtsmacht* (WODC 2010). 5.

<sup>130</sup> J de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* (vierde druk) (Kluwer 2009) 139.

<sup>131</sup> Art 2 Dutch Penal Code, *De Nederlandse Strafwet is toepasselijk op ieder die zich in Nederland aan enig strafbaar feit schuldig maakt*.

<sup>132</sup> JED Voetelink, 'De soevereine staat en de uitoefening van rechtsmacht' - Status of Forces: Strafrechtsmacht over militairen vanuit internationaalrechtelijk & militair-operationeel rechtelijk perspectief', *Academisch Proefschrift Universiteit van Amsterdam* 2012, 108.

<sup>133</sup> R Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht* Kluwer 2014).

- The doctrine of the instrument;
- The doctrine of the constitutive effect;
- The ubiquity doctrine.

On the basis of the first doctrine, the doctrine of the human behaviour, the *locus delicti* is the place where the criminal conduct takes place. The second doctrine, the doctrine of the instrument, applies in cases where a crime is committed with an instrument; the *locus delicti* is determined by the place where the used instrument did its work.<sup>134</sup> On the basis of the third doctrine, the constitutive effects doctrine, the *locus delicti* is the place where the crime is completed (*i.e.*, where the effect occurred), insofar as the occurrence of the effect forms a component of the crime.<sup>135</sup> The last doctrine, the ubiquity doctrine, is not an independent doctrine, but it makes clear that the three abovementioned doctrines can overlap. What can be gathered from this is that the *locus delicti* can be located in more than one place.

### *Application to Corporations*

To apply the aforementioned doctrines to *corporate* conduct requires some more unpacking. This applies specifically to cases concerning the application of the doctrine of the human behaviour, for which territorial conduct is the jurisdictional linchpin. The application of the doctrine of the constitutive effect to corporations, in contrast, is more straightforward, even if some offences can only be committed by legal persons or natural persons as the case may be.<sup>136</sup> After all, this doctrine is only concerned with identifying the adverse territorial effect of foreign conduct, regardless of the nature or type of offense.

Regarding the doctrine of human behaviour, the first step in attributing actions of natural persons to corporations for jurisdictional purposes is determining both which natural persons can have their actions attributed to a legal person and what types of actions can be attributed to legal persons. Two methods have been put forward to that effect: the imputation method and the holistic method. The imputation method establishes corporate criminal liability by attributing (imputing) the actions of one or more natural persons to the corporation. Pursuant to this model, territorial jurisdiction over the corporation may obtain as soon as the natural person (agent of the corporation) carries out a territorial act. The holistic model, for its part, determines liability by means of organizational failure. The question then is how to determine the place of action of the *group of persons* concerned with organizational failure. Wolswijk suggested to focus on the places of actions of the relevant persons (a suggestion which comes close to the imputation method), or on the corporation's place of registration.<sup>137</sup> Schneider, however, (although not writing from a Dutch perspective) proposes to base the territorial place of organization of a corporation on the corporation's

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<sup>134</sup> *ibid*

<sup>135</sup> *ibid*.

<sup>136</sup> A Schneider, 'Corporate Criminal Liability and Conflicts of Jurisdiction', in: D Brodowski, M Espinoza de los Monteros de la Parra, K. Tiedemann, J Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 254.

<sup>137</sup> H Wolswijk, 'Country Report "The Netherlands"', in M Böse, F Meyer, A Schneider (eds), *Conflicts of jurisdiction in criminal matters in the European Union*, vol 1, National reports and comparative analysis (Nomos 2013) 329 – 367.

centre of main interest.<sup>138</sup> Under Schneider's theory, a foreign corporate agent's practices in the Netherlands may not immediately trigger Dutch territorial jurisdiction if the corporation's centre of main interest is outside the Netherlands (even if possibly it has been formally incorporated in the Netherlands). It is clear that a pure imputation method casts the jurisdictional net most widely.

*Practice: (High Court) Jurisprudence*

From the Dutch Supreme Court's case-law it can be gleaned that territoriality is construed broadly. A link with Dutch territory is required for any exercise of jurisdiction, but not all components of the crime need to have taken place on Dutch territory. As the Supreme Court ruled as early as 1981, in a case concerning criminal acts which only had a minor link with Dutch territory, Dutch criminal law still applied to the case.<sup>139</sup> This view still prevails: in 2010, the Supreme Court ruled that the Netherlands has jurisdiction over crimes of which certain components took place outside the Netherlands, as long as a territorial link could be established.<sup>140</sup>

*4.1.3 Extraterritorial Jurisdiction*

Extraterritorial jurisdiction means that the Netherlands has jurisdiction over crimes committed outside Dutch territory.<sup>141</sup> The legal framework concerning extraterritorial jurisdiction in Dutch criminal law has radically changed after the entry into force of the 'Act of Amendment, Review Extraterritorial Jurisdiction' (*Wijzigingswet, Herziening extraterritoriale rechtsmacht*) on the 1<sup>st</sup> of July 2014,<sup>142</sup> alongside the 'Decision regarding International Obligations of Extraterritorial Jurisdiction'. The Decision refers to the different international obligations which the Netherlands meets as result of the amended legislation, listing obligations in the context of respectively the United Nations, the Council of Europe, and the European Union.<sup>143</sup>

In the Netherlands, the exercise of extraterritorial jurisdiction needs a statutory basis. It cannot be based directly on customary international law (*gewoonterecht*).<sup>144</sup> This was confirmed by the Supreme Court in 2001, when it decided that the Dutch judge is not allowed to ignore Dutch national rules of jurisdiction when they conflict with rules of customary international law.<sup>145</sup>

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<sup>138</sup> A Schneider, 'Corporate Criminal Liability and Conflicts of Jurisdiction', in D Brodowski, M Espinoza de los Monteros de la Parra, K Tiedemann, J Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 257.

<sup>139</sup> HR 14 september 1981, ECLI:NL:1981:AC3699, r.o. 4.

<sup>140</sup> HR 2 februari 2010, ECLI:NL:HR:2010:BK6328, r.o. 2.4.

<sup>141</sup> A De Hoogh en G Molier, 'Jurisdictie', in N. Hornbach, R. Lefeber, O. Ribbelink, *Handboek Internationaal Recht*, (TMC Asser Press 2007) 5.

<sup>142</sup> Staatsblad 2013, 484.

<sup>143</sup> Besluit internationale verplichtingen extraterritoriale rechtsmacht <<http://wetten.overheid.nl/BWBR0034775/2016-01-01>> last reviewed 31 May 2016.

<sup>144</sup> R Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in: Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht* (Kluwer2014).

<sup>145</sup> HR 18 september 2001, ECLI:NL:PHR:2001:AB1471, r.o. 6.4.

The active personality principle allows a state to penalize (certain) acts committed by its nationals outside national territory.<sup>146</sup> Under art 7 of the Dutch Penal Code (hereafter: DPC), the active personality principle exists in two forms: one with and one without the condition of dual criminality, *i.e.*, criminality of the act both in the Netherlands and in the state where the act was committed. Under art 7(1) DPC, Dutch criminal law applies to a Dutch national who has committed a crime outside Dutch territory when the act is punishable under both Dutch and foreign territorial law. The dual criminality requirement of art 7(1) DPC is not interpreted very strictly. Art 7(2) DPC provides for exceptions to the dual criminality requirement of art 7(1) DPC, containing a limited list of offences which do not require punishment of the act under foreign territorial law. The crimes listed in art 7(2) DPC include in particular the so-called 'loyalty crimes', these are crimes committed against the security of the State and against royal dignity (art 7(2)(a)).<sup>147</sup> Besides these crimes, art 7(2) (a) DPC includes a number of crimes harming the specific interests of the Dutch State, namely crimes concerning activities of a parliamentary committee, human trafficking, bigamy, and breach of secrets. Art 7(2)(b) DPC criminalizes acts harming the International Criminal Court.<sup>148</sup> Art 7(2)(c) DPC concerns crimes of sexual abuse of minors.<sup>149</sup> Art 7(2)(d) DPC concerns crimes of genital mutilation against a girl below the age of 18.<sup>150</sup> Art 7(2)(e) DPC concerns crimes which force someone to do something under violence or threat of violence.<sup>151</sup> The active personality principle is in the Netherlands restricted to "crimes" (*misdrijven*), although specific statutes allow for the exercise of jurisdiction over (lesser) misdemeanours (*overtredingen*).<sup>152</sup>

As a justification for the active personality principle, Dutch doctrine mentions the prohibition of extraditing one's own nationals.<sup>153</sup> It ensures that a Dutch national returning to the Netherlands after committing a crime abroad, can be prosecuted for that crime in the Netherlands when he cannot be extradited to the foreign state.

The Dutch Supreme Court (hereafter: DSC) ruled in 1990 that the active personality principle also applies to legal persons (corporations).<sup>154</sup> The case concerned the interpretation of article 13 of the Sanctions Act, which was construed as including corporations within its scope. Regarding the requirement of double criminality in article 7 DPC, it is not relevant whether the corporation is a legal subject according to the law of the *locus delicti*. What only matters

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<sup>146</sup> A De Hoogh en G Molier, 'Jurisdictie', in N Hornbach, R Lefeber, O Ribbelink, *Handboek Internationaal Recht* (TMC Asser Press 2007) 5.

<sup>147</sup> art 7(2) sub a Crimes as defined in Title I and II of Book 2 Dutch Penal Code and arts 192a – 192c, 197a – 197c, 206, 237, 272 and 273.

<sup>148</sup> art 7(2) sub b: Crimes as defined in arts 177, 178, 179, 180, 189, 200, 207a, 285a, 361 Dutch Penal Code.

<sup>149</sup> art 7(2) sub c: Crimes as defined in arts 240b and 242-250 Dutch Penal Code.

<sup>150</sup> art 7(2) sub d: Crimes as defined in arts 300 – 303 Dutch Penal Code.

<sup>151</sup> art 7(2) sub e: Crime as defined in art 284 Dutch Penal Code.

<sup>152</sup> A De Hoogh en G Molier, 'Jurisdictie', in N Hornbach, R Lefeber, O Ribbelink, *Handboek Internationaal Recht* (TMC Asser Press 2007) 5.

<sup>153</sup> AH Klip, A-S. Massa, *Communicerende Gronden voor Extraterritoriale Rechtsmacht* (WODC 2010) 91.

<sup>154</sup> HR 11 december 1990, ECLI:NL:HR:1990:ZC8649, r.o. 11.

is whether the act is punishable according to that country's criminal law.<sup>155</sup> The nationality of a corporation is usually established on the basis of the real seat of the corporation (*werkelijke vestigingsplaats*).<sup>156</sup> From the 'Notice Investigation and Prosecution of Foreign Corruption' it follows that legal persons are considered as having Dutch nationality when they are established according to Dutch law and when they have their statutory seat (*statutaire zetel*) in the Netherlands.<sup>157</sup>

The passive personality principle allows the State to penalize certain acts which took place outside the territory of the Netherlands and which are committed against its nationals.<sup>158</sup> Dutch Parliament's reluctance to include the passive personality principle changed after an advisory opinion of the Council of State in 2001, which concerned the implementation of the UN Convention on the Safety of United Nations and Associated Personnel.<sup>159</sup> Until 2014, the principle only applied to a limited list of specific offences, which was gradually extended. For instance, in 2009, article 5b DPC was inserted so as to establish passive personality jurisdiction in the context of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings.

Currently the passive personality principle is laid down in article 5 of the DPC. Pursuant to the 2014 amendment of the DPC, it applies to everyone suspected of committing a crime against a Dutch national, a Dutch resident, a Dutch civil servant, or a Dutch vehicle, vessel, or aircraft, when the crime is sentence of at least 8 years imprisonment. This general inclusion of the principle strengthens the protection given by the DPC.<sup>160</sup>

Article 5(1) DPC lays down the requirements of the passive personality principle. The principle only applies if the crime is punishable with at least eight years of imprisonment under the DPC and if the crime is punishable in the State of commission of the crime.<sup>161</sup> The rationale regarding the eight years rule is that passive personality jurisdiction should only be justified for crimes of a certain gravity.<sup>162</sup>

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<sup>155</sup> R Van Elst, 'Tekst & Commentaar bij artikelen 2-8 Sr', in Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht* (Kluwer 2014).

<sup>156</sup> J de Hullu, *Materieel Strafrecht, over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* (vierde druk) (Kluwer 2009) 142.

<sup>157</sup> Aanwijzing opsporing en vervolging buitenlandse corruptie', *Stcr*.2012, no 26939.

<sup>158</sup> A De Hoogh en G Molier, 'Jurisdicctie', in N Hornbach, R Lefeber, O Ribbelink, *Handboek Internationaal Recht* (TMC Asser Press 2007) 5.

<sup>159</sup> Advies Raad van State en Nader Rapport, *Kamerstukken II 2001/02, 28028*, p 2; Convention on the Safety of United Nations and Associated Personnel <<http://www.un.org/law/cod/safety.htm>> last reviewed 30 March 2016; Verdrag inzake de Veiligheid van VN-personeel en geassocieerd personeel, *Tractatenblad* 1998, 84.

<sup>160</sup> R Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht* (Kluwer 2014).

<sup>161</sup> art 5(1) Dutch Penal Code, De Nederlandse strafwet is toepasselijk op een ieder die zich buiten Nederland schuldig maakt aan een misdrijf tegen een Nederlander, een Nederlandse ambtenaar, een Nederlands voertuig, vaartuig of luchtvaartuig, voor zover op dit feit naar de wettelijke omschrijving een gevangenisstraf van ten minste acht jaren is gesteld en daarop door de wet van het land waar het begaan is, straf is gesteld.

<sup>162</sup> *Kamerstukken II 2012/13, 33572*, 3.

The passive personality principle also extends to corporations as, under Dutch law, 'person' is also understood 'legal person'.<sup>163</sup>

On the basis of article 4 sub a-d and sub f, DPC jurisdiction can be obtained under the 'protective principle'. Such jurisdiction concerns conduct which took place outside Dutch territory and threatens State security. The protection of 'important national interests' is the main aim of this relevant provision.<sup>164</sup>

The listed crimes concern not only national security in the strict sense but also crimes against the physical integrity of the King and counterfeiting of national bonds.<sup>165</sup> These provisions have been crafted in order to protect the Dutch political structure and its economy.<sup>166</sup> There are no specific requirements attached to the exercise of protective jurisdiction.

In the Netherlands no practice exists which targets companies under secondary boycotts. However, there is practice targeting companies under primary boycotts, *e.g.*, the EU sanctions against the Russian Federation in the wake of the latter's actions in Ukraine.<sup>167</sup> The boycott has an impact on Dutch companies, mainly those active within the vegetable and fruit sector.<sup>168</sup> The EU has also imposed sanctions on Syria, on the ground that Syria oppresses its own citizens.<sup>169</sup> EU sanctions regulations are directly applicable in the Netherlands.

Vicarious or derivative jurisdiction<sup>170</sup> is recognized in articles 8b and 8c DPC. Under article 8b(1), Dutch criminal law applies when criminal proceedings have been transferred to the Netherlands by a foreign state on the basis of a treaty which provides for criminal jurisdiction for the Netherlands. Under article 8b(3), Dutch criminal law applies to any person whose extradition for a terrorist offense, or an offense in preparation of, or facilitating a terrorist offense, has been declared inadmissible, has been declined, or has been refused. Under article 8b(4), Dutch criminal law also applies to anyone against whom the criminal proceedings have been taken over by the Netherlands at the request of an international tribunal established by treaty or decision of an international organization. Finally, under article 8c, Dutch criminal law applies to any alien who commits, outside the Netherlands, an offence punishable by at least eight years of imprisonment, if this alien is present in the

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<sup>163</sup> R Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht* (Kluwer 2014).

<sup>164</sup> *Kamerstukken II* 2012/13, 33572, 3.

<sup>165</sup> R Van Elst, 'Tekst & Commentaar Strafrecht, commentaar op artikelen 2-8 Sr', in Cleiren, Verpalen, Crijns, Arendse, *Tekst & Commentaar Wetboek van Strafrecht* (Kluwer 2014).

<sup>166</sup> *Kamerstukken II* 2001/02, 28337, 3.

<sup>167</sup> The European Council Regulation No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L 229/1.

<sup>168</sup> Rijksoverheid *Sancties tegen Rusland*, <<https://www.rijksoverheid.nl/onderwerpen/internationale-sancties/inhoud/sancties-tegen-rusland>> last reviewed 25 August 2016.

<sup>169</sup> The European Council Regulation No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria [2012] OJ L 16/1.

<sup>170</sup> Also referred to as *Stellvertretende Strafrechtspflege*

Netherlands, and (a) extradition for this offense is refused, or (b) extradition is impossible because of the absence of a treaty relationship, subject to the requirement of dual criminality.

#### 4.1.4 *Universal jurisdiction*

Universal jurisdiction can be regarded as the broadest ground for establishing jurisdiction, as jurisdiction based on this principle can be established in respect of every person on foreign territory who commits a very serious crime. A link with the state of prosecution is, unlike the other grounds for establishing jurisdiction, not required for establishing universal jurisdiction.<sup>171</sup>

##### *Dutch Penal Code*

Although article 4 Dutch Penal Code (hereafter: DPC) is primarily concerned with jurisdiction based on the protective principle, it also features the principle of universality. On the basis of article 4 sub e DPC, the Netherlands enjoys jurisdiction based on the universality principle for crimes related to terrorism and, on the basis of article 4 sub c DPC, for crimes concerning counterfeiting (*valsmunterij*).<sup>172</sup> These sub-articles may concern the protection of national interests, yet their primary aim is compliance with international norms.<sup>173</sup> For counterfeiting, this is compliance with the International Convention for the Suppression of Counterfeiting Currency, Geneva, 20 April 1929.<sup>174</sup> While the Act has been subject to legislative changes, it has nevertheless been held to maintain the grounds for jurisdiction based on universal jurisdiction.<sup>175</sup>

##### *Introduction of International Crimes Act*

Universal jurisdiction over *core crimes* is governed by the International Crimes Act (hereafter: ICA), adopted in 2003. Articles 2a and 3-8 ICA establish universal jurisdiction for genocide, crimes against humanity, war crimes, torture, and enforced disappearance.

The ICA provides that jurisdiction can be obtained over any person suspected of committing one of these crimes outside of the Netherlands insofar as he is present on Dutch territory.<sup>176</sup> This is referred to as 'secondary universal jurisdiction', *i.e.*, universal jurisdiction that is applied on the basis of territorial presence of the presumed offender after the fact is committed. The ICA only applies to core crimes committed after 2003. Core crimes committed before 2003 fall under discrete criminal codes, *i.e.*, the Wartime Offences Act dealing with core crimes that were applicable before 2003.

In practice, no corporation has yet been prosecuted in the Netherlands on the basis of the universality principle as laid down in the ICA. Given the problems of establishing transitory

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<sup>171</sup> *Kamerstukken II* 2012/13, 33572, 3, p. 7, *Rijksoverheid* 11 maart 2013, retrieved from: <<https://www.google.com/#q=artikel+4+wetboek+van+strafrecht+universele+rechtsmacht+>> last reviewed 28 August 2016.

<sup>172</sup> R van Elst, 'Tekst en Commentaar Strafrecht, commentaar op art. 4 Sr', in Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht*, (Kluwer 2014).

<sup>173</sup> *ibid.*

<sup>174</sup> *ibid.*

<sup>175</sup> *Kamerstukken II* 2012/13, 33572, 3.

<sup>176</sup> art 2(a),(b),(c) of the International Crimes Act.

corporate presence, it is more likely that prosecutions will be brought under the nationality principle or the territoriality principle.

#### 4.1.5 *Other sources of jurisdiction*

As regards antitrust law, it is observed that the Dutch Competition Law Act of 1998 can be applied on the basis of the effects doctrine. Article 6 of this Act prohibits anti-competitive agreements between corporations that adversely affect natural competition on the Dutch market. Thus, the Act specifically refers to the effect which the crime has on the Dutch market. This was emphasised in the *travaux préparatoires*, where it was stated that neither the place where the agreements were made, nor the domicile of the corporations mattered, and that the deciding factor was where the agreement comes into effect.<sup>177</sup>

### 4.2 Jurisdiction for Prosecuting Corporations under International Law (UN law, multilateral treaties)

#### 4.2.1 *General*

In 2014 the provisions on jurisdiction in the Dutch Penal Code (hereafter: DPC) were revised to enable the Netherlands to better fulfil its international obligations regarding the establishment of extraterritorial jurisdiction. After the revision, the fulfilment of international obligations is set out in article 6 DPC, in conjunction with the Decision regarding International Obligations of Extraterritorial Jurisdiction, which includes a list of treaty obligations (UN, Council of Europe, EU). Since 2014, when the Netherlands enters into new international commitments, only the Decision, and not the DPC itself, needs to be amended.<sup>178</sup>

#### 4.2.2 *Jurisdiction prescribed by International Humanitarian Law – Core Crimes*

In the ICA, instead of translating the definitions of the crimes, the Dutch legislator decided to rather refer to the definitions already existing in the Geneva Conventions and the Statute of the International Criminal Court.<sup>179</sup> Article 5 ICA refers to grave breaches of the four Geneva Conventions and Additional Protocol I, as well as breaches of Additional Protocol II and the Hague Convention regarding the protection of cultural heritage. Article 6 concerns acts criminalised in case of a non-international armed conflict under Common Article 3 of the Geneva Conventions, as well as a list of other crimes, such as sexual violence and acts against a civilian population. Finally, similar to article 8 of the Wartime Offences Act, article 7 was included to prevent leaving unpunished war crimes not specifically defined in the previous articles; it criminalises any acts violating the treaty and customary laws of war in both an international and non-international conflict. It is emphasized again that the exercise of universal jurisdiction depends on the alleged offender being present on Dutch territory. Arguably, this limitation finds its roots in the universal jurisdiction provisions of the Geneva Conventions, which operate on the basis of the principle of *aut dedere aut judicare*. Under this

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<sup>177</sup> *Kamerstukken II 1995/96, 24707, 3.*

<sup>178</sup> R Van Elst, 'Tekst en Commentaar Internationaal Strafrecht, commentaar op artikelen 2-8 Sr', in DJMW Paridaens, PAM Verrest, *Tekst & Commentaar Internationaal Strafrecht* (Kluwer 2015).

<sup>179</sup> *Kamerstukken II 2001/02, 28337, 3, p 3.*

principle, a state only has the option to extradite when it has custody of the offender, which in turn requires the person's arrest *in the territory*.

#### 4.2.3 Jurisdiction based on Customary International Law

The Netherlands does not acknowledge courts' exercise of jurisdiction directly based on customary international law, as it interprets the legality (*lex certa*) principle strictly.<sup>180</sup>

## 5 Overlapping Domestic Legal Framework and the Prosecution of Corporations

### 5.1 Conflicts of jurisdiction – General

The grounds for establishing (extraterritorial) jurisdiction under Dutch law are rather extensive. In drafting these grounds, the Dutch legislator was mainly driven by the motivation to protect the interests of the Netherlands. A Dutch commentator has observed that this focus on the national interest may well lead to an increase in positive conflicts of jurisdiction.<sup>181</sup> The Dutch Government may have been aware of the potential for such conflicts, but has not drafted rules on how to solve them. Pragmatic solutions have thus been developed, such as the possibility of transfer of prosecution or transfer of execution of a decision.<sup>182</sup>

For instance, article 552t Dutch Code of Criminal Procedure (hereafter: DCCP), provides that the Dutch public prosecutor may relinquish the prosecution to another state, in view of the proper administration of justice (*goede rechtsbedeling*).<sup>183</sup> The risk of positive conflicts of jurisdiction should not be overstated, however. In practice, few relevant extraterritorial cases have been brought in the Netherlands,<sup>184</sup> and even fewer cases have been brought against corporations for the commission of international crimes. Thus, it can be asserted that *negative* conflicts of jurisdiction (under-enforcement) are more likely to arise than positive ones (over-enforcement). This is also borne out by interviews conducted with practitioners.

Indeed, it appears that the Government's commitment to principles of corporate social responsibility (hereafter: CSR) is not necessarily matched by an increased willingness to prosecute corporations for CSR violations, *e.g.*, gross human rights violations, international crimes, or corruption. Prosecuting a major corporation carries the risk of financial and reputational damage to the corporation, which may eventually adversely affect the Dutch economy.<sup>185</sup> In cases against individuals, the hardship endured by the targeted person may also be factored in.

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<sup>180</sup> R van Elst, 'Tekst en Commentaar Strafrecht, commentaar op art. 4 Sr', in Cleiren, Verpalen, Crijns, Arendse, *Tekst&Commentaar Wetboek van Strafrecht* (Kluwer 2014) 8.

<sup>181</sup> MJJP Luchtman, 'De opkomst van het beginsel van een goede rechtsbedeling', *WvSvA.L. Melai/ A.H. Klip e.a. IV.1.1.6.1*.

<sup>182</sup> MJJP Luchtman, 'De opkomst van het beginsel van een goede rechtsbedeling', *WvSvA.L. Melai/ A H Klip e.a. IV.1.1.6.1*.

<sup>183</sup> art 552t (1) Dutch Code of Criminal Procedure.

<sup>184</sup> AH Klip, AS. Massa, *Communicerende Gronden voor Extraterritoriale Rechtsmacht*, (WODC 2010) 98.

<sup>185</sup> L Enneking, F Kristen e.a., *Zorgplichten van Nederlandse Ondernemingen inzake Internationaal Maatschappelijk Verantwoord Ondernemen* (Boom Juridische Uitgevers 2016) 136.

Also, practical factors are cited as reasons for under-enforcement, such as a lack of capacity within the Dutch Public Prosecutor's Office (hereafter: DPPO) and the difficulty of fact-finding on foreign territory.<sup>186</sup>

A respondent indicated that a substantial number of suspected corporations may have gone bankrupt by the time a decision to prosecute is taken, at which point enforcement no longer serves its purpose.

The respondent indicated that there are three key factors which play a role in taking a decision to prosecute or not: capacity, priority, and complexity. International crimes cases are often complex, and thus require high quality investigators. However, the average educational level of police officers in the Netherlands is relatively low (MBO, *i.e.*, vocational high school training). This may not always be sufficient to deal with highly complex cases. The respondent also stated that priority will be given to cases with a high chance of success, *i.e.*, cases in which sufficient information and evidence can be gathered, and in which investigations can be conducted in a foreign State. The respondent also stated that under-enforcement may be an impression rather than a reality: NGOs may bring a case to the attention of the prosecutor without hard evidence being available.

It is finally emphasized that, while prosecution may be rare, this does not mean that the DPPO does not act against corporations committing international crimes. While actual trials may not often be held, settlements between the DPPO and corporations or corporate officers may become routine occurrences.

## 5.2 Overlapping Domestic Jurisdictions – in a nutshell

Civil/tort jurisdiction is governed by the EU Brussels I Regulation (recast 2012), which is directly applicable in the Netherlands.<sup>187</sup> Pursuant to this Regulation, Dutch courts have civil jurisdiction over disputes involving corporations domiciled in the Netherlands.<sup>188</sup> Domicile is based on the location of the corporation's statutory seat, its central administration, or its principal place of business.<sup>189</sup> To comply with article 49 TFEU in which the freedom of establishment is laid down, EU Member States must determine the nationality of corporations by the place of registration in cases concerning active nationality. If it will determine the nationality by means of the place where the most actions take place, the other manner in determining nationality, it will violate article 49 TFEU as this freedom of establishment forbids discrimination of corporations registered under foreign law.<sup>190</sup> When the corporation is domiciled in another EU member state, there are exceptional situations in which a Dutch court can still claim jurisdiction over claims brought against the corporation (arts 5 to 7 Regulation). This special jurisdiction applies to cases where the harmful event

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<sup>186</sup> *ibid* 136.

<sup>187</sup> Eur-Lex <<http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32001R0044>> last reviewed 18 August 2016.

<sup>188</sup> art 4(1) Brussel Ibis-Vo.

<sup>189</sup> art 63(1) Brussel Ibis-Vo

<sup>190</sup> A Schneider, 'Corporate Criminal Liability and Conflicts of Jurisdiction', in D Brodowski, M Espinoza de los Monteros de la Parra, K Tiedemann, J Vogel (eds), *Regulating Corporate Criminal Liability* (Springer 2014) 252.

takes place in the Netherlands<sup>191</sup> or when the dispute is linked to the operations of a branch or agency situated in the Netherlands.<sup>192</sup> Moreover, when a dispute is closely linked to a different claim already pending before a Dutch court, there might be sufficient overlap between the claims to join them.<sup>193</sup> Finally, the parties to the dispute could choose a Dutch court as the forum.<sup>194</sup>

When claims are brought before Dutch courts which concern corporations domiciled outside of the Netherlands (and the rest of the EU), different jurisdictional rules apply. Jurisdiction in these cases must be determined on the basis of the Dutch Code of Civil Procedure (hereafter: DCCP).<sup>195</sup> The most common basis for Dutch jurisdiction is similar to the Brussel I Regulation, namely the party's domicile in the Netherlands.<sup>196</sup> Besides the domicile link, Dutch law also provides grounds for jurisdiction on the basis of events that have taken place in the Netherlands<sup>197</sup> or when there is a series of cases so much interlinked, that it would benefit efficiency to consider them jointly.<sup>198</sup> The final noteworthy ground for jurisdiction is *forum necessitatis*, as established under article 9 DCCP. This principle applies when claims cannot be brought before a foreign court or when a case is somehow linked to the Netherlands and it is deemed unacceptable to require the plaintiff to submit the case to a foreign court.

### 5.3 Conflicting International Jurisdictions – in a nutshell

Even though multiple grounds of jurisdiction exist, the Netherlands has a preference for investigation and prosecution by the state where the crime took place.<sup>199</sup> In practice, however, there are few cases of multiple states being able and willing to prosecute the same cases on different - and conflicting - jurisdictional grounds. When a conflict of jurisdiction nevertheless arises, the states concerned will have to jointly consider which state is most suitable to pursue the prosecution, in the view of the proper administration of justice.<sup>200</sup>

## 6 Proposals for Reform of the Legal Framework of Jurisdiction

As explained above, Dutch jurisdictional rules have recently been overhauled through an amendment of the Dutch Penal Code in 2014. The aim of the amendment was to strengthen the possibilities of establishing jurisdiction over crimes with extraterritorial aspects, mainly in order to protect the national interests of the Netherlands but also to meet the State's

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<sup>191</sup> art 7(2) Brussel Ibis-Vo

<sup>192</sup> art 7(5) Brussel Ibis-Vo

<sup>193</sup> art 8(1) Brussel Ibis-Vo

<sup>194</sup> art 25 & Art 26 Brussel Ibis-Vo

<sup>195</sup> arts 1 to 14 of the Dutch Code of Civil Procedure (Rv)

<sup>196</sup> art 2 Dutch Code of Civil Procedure (Rv)

<sup>197</sup> art 6(e) DCCP (Rv)

<sup>198</sup> art 7(1) DCCP (Rv). See, *eg*, the *Akpan* case Rb Den Haag 24 februari 2010; ECLI:NL:RBSGR:2010:BM1469; Rb Den Haag 30 januari 2013, ECLI:NL:RBDHA:2013:BY9854.

<sup>199</sup> *Kamerstukken II* 2012/13, 33572, 2, p. 14.

<sup>200</sup> *ibid* 15.

international (treaty) obligations.<sup>201</sup> It is unlikely that the legislator will amend the Penal Code for this purpose again any time soon.

In Dutch academia, a discussion is currently going on regarding the impact of the rules of jurisdiction on persons suspected of cross-border crime. As explained above, the Dutch Penal Code contains an extensive list of grounds on which prosecutors and courts can base their jurisdiction with a view to combating cross-border crime, without providing any rules on hierarchy between these grounds. The situation is largely similar in other states. As a result, prosecutorial 'forum shopping' may take place: a jurisdiction perceived to be most suitable for an investigation or successful prosecution may, almost randomly, be chosen. This choice of forum has significant consequences for the suspect, *e.g.*, in terms of language and location of the trial. Individual *rights* of the suspect may even be jeopardized, *e.g.*, the right to a family life and the right to a lawful judge. Although this latter right is interpreted differently in different States,<sup>202</sup> the interpretations have in common that the suspect ought to be protected against arbitrariness and that a prosecution should be foreseeable. This discussion brings to the fore the tension between the suspects' rights and the need for an effective approach to fight cross-border crime.<sup>203</sup> In some cases, it may well happen that the latter unfairly prevails over the former. Therefore, in each case, prosecutors and courts may want to be guided by the 'lawful judge' concept. Alternatively, and relatedly, a hierarchy between jurisdictional grounds may be considered in the interest of individual rights protection.

Another proposal for reform relates to the definition of a Dutch legal person (corporation), as the interpretation thereof may cause difficulties in practice. More specifically, one may wonder whether Dutch prosecutors should go after corporations which are only *registered* in the Netherlands, without engaging in any significant business activity on Dutch territory (*i.e.*, the so-called *postbusfirma's*). After all, these corporations have only been established in (or relocated to) the Netherlands for fiscal reasons and because of the presence of the airport of Schiphol and the port of Rotterdam.<sup>204</sup> Dutch prosecutors and courts may then spend scarce government resources to investigate and prosecute such basically foreign corporations in respect of cross-border crime. In a technical-jurisdictional case, such cases are based on the active personality principle, but in fact the Netherlands may act as a global law-enforcer. The aforementioned *VimpelCom* corruption case, concerning the Dutch prosecution of a Russian corporation headquartered in the Netherlands, is a case in point.

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<sup>201</sup> 'Stb. 2013, 484 Uitbreiding extraterritoriale rechtsmacht' <<http://njb.nl/wetgeving/staatsbladen/uitbreiding-extraterritoriale-rechtsmacht.6516.lynkx>> last reviewed 31 May 2016.

<sup>202</sup> M Fabri and P Langbroek, 'Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries', *European Journal of Legal Studies*, Volume 1 issue 2 2007, 6.

<sup>203</sup> M Panzavolta, 'Choice of Forum and the Lawful Judge Concept', in M Luchtman, *Choice of forum in cooperation against EU financial crime: freedom, security and justice and the protection of specific EU- interests* (The Hague 2013) 147.

<sup>204</sup> M van Geest, J van Kleef, HW Smits, *Het belastingparadijs, waarom niemand hier belasting betaalt behalve u* (Business Contact 2013) hoofdstuk 6.

One respondent recommended to improve cooperation between NGOs and law-enforcement authorities, especially with respect to the evidence which an NGO can give to the prosecutor in case of suspicions of corporate criminality.

A respondent also cited the need for more specialized and better trained police officers within the investigation teams responsible for complex international crime cases, especially regarding cases of terrorism, which are on the rise. Compulsory training or a higher level of required education may be a solution.

Another respondent recommended the creation of more legal possibilities to cooperate with witnesses and advocated a plea bargaining system. This respondent also considered the maximum sentence of five years for 'sedition to genocide' (*opruiing tot genocide*) in respect of crimes committed before the entry into force of the ICA in 2003, e.g., in respect of crimes committed in Rwanda, as too low.

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# FINISH REPORT ON PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW

By Dan Helenius\*

## 1 General framework for prosecuting corporations for violations of international criminal law

### 1.1 Legal rules governing the prosecution of corporations

#### 1.1.1 Substantive criminal law establishing criminal liability

Corporate criminal liability was introduced in the Finnish legal system in 1995. According to chapter 9, section 1, paragraph 1 of the Finnish Criminal Code (39/1889, hereafter CC), a corporation, foundation or other legal entity in whose operations an offence has been committed may on the request of the public prosecutor be sentenced to a corporate fine if such a sanction has been provided in this Code for the offence.

In case the preconditions for corporate criminal liability are met, the corporation is sentenced to a corporate fine of at least 850 euros and at most 850,000 euros. A corporate fine can essentially be regarded as a blame directed at the governance of the legal person.<sup>1</sup> A corporation is always sentenced on the basis of an offence committed by a natural person in its operations, and is not, as such, regarded as the actual offender. On the other hand, corporate criminal liability does not require that the natural person who committed the offence is sentenced (c 9, s 2, para 2 CC), which can be due e.g. to that person's death.

A corporate fine can in principle be imposed on any corporation that constitutes a legal person according to civil law, including e.g. companies, foundations and associations. Corporate criminal liability does not apply to offences committed in the exercise of public authority (c 9, s 1, para 2 CC), but state owned companies are in principle not excluded from the sphere of criminal liability.

Generally speaking, the preconditions for corporate criminal liability can be divided into two parts: requirements concerning the offence and a sort of communality requirement.<sup>2</sup> The preconditions for liability are, thus, rather strict. It is not sufficient as such that an offence has been committed in the operations of the corporation. It must also be proven that the corporation has acted reprehensibly in its operations and that these actions are connected to the commission of the offence.<sup>3</sup>

The requirements concerning the offence can be divided into four sub-requirements. Firstly, corporate criminal liability only applies to those offences for which it has been specifically

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<sup>1</sup> Dan Frände, *Allmän straffrätt* (Forum Iuris 2012) 379.

<sup>2</sup> See in detail Jussi Matikkala, *Rikosoikeudellinen seuraamusjärjestelmä* (Edita 2010) 182–188.

<sup>3</sup> Dan Helenius, 'Oikeushenkilön rangaistusvastuu Suomen ulkopuolella tehdyistä rikoksista', *Defensor Legis* 4/2015, 772–790, 776.

prescribed (about 90 offences at the moment). These offences include foremost offences that are presumed to be committed rationally and methodically (e.g. bribery and environmental offences). In other words, not all offences come into question. In recent years, the scope of offences for which corporate criminal liability is prescribed has continually increased, which has mainly been due to requirements set by EU legislation. However, it must be noted that corporate criminal liability is currently not prescribed for any of the so-called international core crimes (see further c 2.3.6).<sup>4</sup>

Secondly, all general requirements for criminal liability must be met in the concrete case. It must be possible to hold the individual offender liable in accordance with all the general and specific requirements that apply to the offence in question. If the offence requires intent, the offender must have acted intentionally in order for corporate criminal liability to apply.<sup>5</sup> However, it is not necessary to prove the identity of the individual offender as long as it can be proven that all requirements for criminal liability are otherwise at hand ('anonymous guilt').

Thirdly, the offender must have acted 'on behalf or for the benefit of the corporation' (c 9, s 3, para 1 CC). The offender can act 'on behalf' of the corporation if he/she is entitled to represent the corporation, to use its right of decision in a matter or has been tasked with carrying out an act. A person can also act on behalf of a corporation if he/she has been led to believe that the act is approved. The offence has, consequently, either been authorized or at least approved. A person acting 'for the benefit' of a corporation has no official authorization or approval of his/her act, but has rather acted on his/her own initiative when an opportunity has presented itself for an act that benefits the corporation. The third requirement is not fulfilled if the offence is directed at the corporation itself or if it has clearly been committed contrary to the corporation's will.<sup>6</sup>

Fourthly, the offender must 'belong to the management of the corporation, be in a service or employment relationship with it or act on assignment by a representative of the corporation' (c 9, s 3, para 1 CC). Accordingly, situations where a complete outsider commits an offence for the benefit of a corporation are excluded. When the third and fourth requirement are fulfilled, one can say that the offence has been committed 'in the operations' of a corporation.<sup>7</sup>

In addition to the requirements concerning the offence, there must also exist a sort of communality between the legal person and the offence. A general requirement for corporate criminal liability is that the management of a legal person has 'been an accomplice in the offence or allowed the commission of the offence or that the care and diligence necessary for the prevention of the offence have not been observed in the operations of the corporation' (c

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<sup>4</sup> Helenius (n 3) 784.

<sup>5</sup> Government Bill HE 95/1993 vp 33.

<sup>6</sup> Government Bill HE 95/1993 vp 35 and Matikkala (n 2) 184–185.

<sup>7</sup> Government Bill HE 95/1993 vp 35–36 and Matikkala (n 2) 184.

9, s 2, para 1 CC). The communality requirement can, therefore, be based either on equivalency or so-called vicarious liability.<sup>8</sup>

A corporation's criminal liability is based on equivalency when 'a person who is part of its statutory organ or other management or who exercises actual decision-making authority therein has been an accomplice in an offence or allowed the commission of the offence'. In this case, the basis for liability is constituted by the immediate contribution of a person belonging to the management of the legal person. The management of a corporation is naturally regarded as an accomplice in the offence if a member of the management is the primary perpetrator of the offence. Members of the management can also act as abettors or instigators, if the actual perpetrator has e.g. an employment relationship with the corporation.<sup>9</sup>

The management of a corporation can also contribute to the offence by 'allowing' it to be committed. This is the case when a person belonging to the management of the corporation knows that an offence will be committed and it would be possible to prevent the offence. If the offence could not have been prevented, the mere knowledge of the offence is not a sufficient basis for liability.<sup>10</sup>

A corporation's criminal liability is based on vicarious liability when 'the care and diligence necessary for the prevention of the offence have not been observed in the operations of the corporation'. A corporation should organize its operations in a way that prevents offences from being committed on behalf or for the benefit of it. Vicarious liability also requires that the negligent behaviour of the management has made the offence possible or at least clearly increased the possibility of it being committed. Neglecting to observe the necessary care and diligence does not in itself have to be punishable as long as it is possible to establish a causal connection between the negligent behaviour and the offence.<sup>11</sup>

### 1.1.2 Procedural law governing criminal prosecution

Since legal persons can be sentenced to a corporate fine, they can also act as parties in a criminal trial. However, legal persons do not have procedural ability, i.e. they are not themselves capable of acting in a criminal trial. Rather, they must be represented by one of their legal representatives (e.g. one of the board members). However, the task of handling the defence in court is usually delegated to a separate attorney.<sup>12</sup>

Under the Finnish procedural rules, a natural person can, under certain circumstances, be tried *in absentia*. There are two ways of deciding a case without conducting a main, oral hearing: A written procedure and a hearing *in absentia*.

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<sup>8</sup> Matikkala (n 2) 185.

<sup>9</sup> Matikkala (n 2) 185.

<sup>10</sup> Government Bill HE 95/1993 vp 31.

<sup>11</sup> Government Bill HE 95/1993 vp 16 and 33 and Heikki Jaatinen, *Oikeushenkilön rangaistusvastuu* (Kauppakaari 2000), 107 and Matikkala (n 2) 186.

<sup>12</sup> Juha Lappalainen and Tuomas Hupli, 'Asianosainten edustajat ja avustajat' in Dan Frände (ed), *Prosessioikeus* (Alma talent 2017) 453.

C 5a of the Finnish Criminal Procedure Act (689/1997, hereafter CPA) provides for a written procedure. This means that there is no oral hearing if the following conditions are fulfilled (S 1, para 1 of c 5a):

- 1) the prescribed sentence for any of the offences as contained in the indictment is not higher than a fine or imprisonment for maximum of two years,
- 2) the defendant confesses to the indicted offence and explicitly renounces his right to an oral hearing and agrees to the written procedure,
- 3) the defendant was of age when the offence was committed,
- 4) the injured party has informed of his intention to renounce the holding of the hearing during pre-trial investigation or later, and
- 5) a hearing regarding the resolution of the case is unnecessary from the perspective of an overall evaluation.

According to the main rule in c 5a, s 1, para 2, the maximum sentence in a written procedure must not exceed imprisonment of six months.

C 8, s 11, para 1 CPA states that a case may be heard and decided regardless of the absence of the defendant if his presence is not necessary for the resolution of the case and if he has been summoned to the hearing under such a warning. In this event, the defendant may be sentenced to a summary penal fee, fine or to imprisonment for a maximum of three months, and subjected to forfeiture not exceeding 10,000 euros. The absence of the defendant does not prevent the rejection of the charge or the other demands (C 8, s 11, para 3 CPA). In addition, the defendant can consent to the case being heard and decided in his absence. He must have been summoned to the hearing and his presence must not be necessary for deciding the case. The person can, in this case, not be sentenced to imprisonment for more than six months (c 8, s 12 CPA). Unless the conditions in the above mentioned sections 11 and 12 are fulfilled, the defendant cannot be sentenced to imprisonment unless he has been heard in person in the main hearing (c 8, s 13, para 1 CPA).

However, under the conditions prescribed for a written procedure as well as a hearing in absentia, only fines and prison sentences of a certain length may be imposed. Since a corporate fine is a separate type of punishment, it cannot be imposed without the defendant being present at the main hearing.<sup>13</sup> It can be noted though that under the Finnish system, a defendant that is not personally present at the hearing (in this case, the legal representative of the legal person), but who is represented by an attorney, is not considered to be absent.

## 1.2 Rules on criminal jurisdiction

### 1.2.1 *Jurisdiction and corporations*

The provisions on the scope of application of Finnish criminal law, i.e. the provisions on criminal jurisdiction, were thoroughly revised in 1996. This revision restricted the scope of application of Finnish criminal law on many points e.g. by requiring double criminality and a separate prosecution order in a greater extent for offences committed outside of Finland.

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<sup>13</sup> Dan Frände, 'Rikosjutun käsittely' in Dan Frände (ed), *Prosessioikeus* (Alma talent 2017) 1102.

This restriction was partly due to the fact that the provisions in force at the time were deemed problematic as regarded e.g. norms of international law and the possibilities for conflicts of jurisdiction with other States.<sup>14</sup>

In connections to this reform, it was also deemed necessary to take the provisions on corporate criminal liability, which had been introduced the previous year, into account. Many corporations act in several countries, and they often strive to allocate their activity to places that offer the most economic benefits. However, a corporation in the operations of which an offence has been committed should not be able to escape criminal responsibility simply because the offence has been committed abroad.<sup>15</sup> Accordingly, Finland's criminal jurisdiction was extended also to offences committed abroad by Finnish corporations. According to c 1, s 9 CC: 'If, under this chapter, Finnish law applies to the offence, Finnish law applies also to the determination of corporate criminal liability.'

As is apparent from the wording of this provision, it does not constitute an 'independent' basis for criminal jurisdiction.<sup>16</sup> Namely, the provision is dependent upon the other jurisdictional provisions in Chapter 1 CC in the sense that it only becomes applicable provided that Finnish criminal law can be applied to the act committed by a natural person upon which the corporation's criminal liability is based. Legal persons are not regarded as perpetrators according to Finnish law but can only be sentenced on the basis of an offence that has been committed by a natural person in the operations of it. In the case that Finnish criminal law applies to the offence committed by a natural person, a corporation can also be sentenced provided that corporate criminal liability is provided for the offence in question.<sup>17</sup>

Holding a Finnish corporation criminally liable for an offence committed abroad, therefore, not only requires that Finnish criminal law applies in accordance with the provisions in Chapter 1 CC but also that the general preconditions for corporate criminal liability in Chapter 9 CC are met. When examining a corporation's criminal liability for offences committed abroad, these provisions, consequently, have to be examined side by side.

### 1.2.2 *Defining jurisdiction*

The provisions on the scope of application of Finnish criminal law, i.e. the provisions on Finland's criminal jurisdiction, are found in Chapter 1 CC. Since most criminal provisions in the special part of the CC are silent as regards their scope of application, the concrete applicability of these provisions is only established by the general provisions on the scope of application of Finnish criminal law. The question of the individual criminal provisions' scope of application, therefore, has to be analysed together with the general scope of

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<sup>14</sup> See in detail Dan Frände and Dan Helenius, 'Country Report "Finland"', in Martin Böse, Frank Meyer and Anne Schneider (eds), *Conflicts of Jurisdiction in Criminal Matters in the European Union. Volume I: National Reports and Comparative Analysis* (Nomos 2013).

<sup>15</sup> Government Bill HE 1/1996 vp 24.

<sup>16</sup> Helenius (n 3) 773.

<sup>17</sup> Government Bill HE 1/1996 vp 24.

application of criminal law. By enacting legislation on criminal jurisdiction, the legislator also sets the legal frames for the applicability of the individual criminal provisions.<sup>18</sup>

Consequently, the rules on criminal jurisdiction create the basis for applicability of the special part of the criminal code. Without rules on criminal jurisdiction, the individual criminal provisions lack applicability. A criminal provision can, accordingly, not be applied to an act that one of the provisions on criminal jurisdiction is not also applicable to. Such an act is, therefore, not punishable according to Finnish law.<sup>19</sup>

The rules on criminal jurisdiction also have a dual legal character; they have substantive as well as a procedural side.<sup>20</sup> This dual character is due to the fact that Finnish courts can only apply Finnish criminal law. As long as the courts only apply domestic criminal law, the provisions on the scope of application of Finnish criminal law are also decisive for the jurisdiction of the domestic criminal courts. In this regard, one can also talk about jurisdiction to prescribe on the one hand, i.e. the State's right to extend its legislation to certain acts, and jurisdiction to adjudicate on the other hand, i.e. the judiciaries' right to apply legislation within the limits set by the legislator. Accordingly, the rules on criminal jurisdiction are primarily regarded as substantive rules even though they also have a procedural function. If a certain act does not fall within the scope of application of Finnish criminal law, the Finnish courts cannot have jurisdiction over the act either. The question of the criminal law's scope of application, thus, precedes the question of the criminal courts' jurisdiction.<sup>21</sup> On the other hand, the provisions on which court is competent to handle an individual matter are found in the Criminal Procedure Act (689/1997). Before one can decide which court is competent to handle a matter, one must first establish that Finnish criminal law in general applies to the matter.<sup>22</sup>

### 1.3 International law / Human rights framework

Finland has implemented the following international agreements that are deemed to enable the use of universal jurisdiction (see further chapter 2.3.6):

(1) counterfeiting currency, the preparation of the counterfeiting of currency, or the use of counterfeited currency, referred to in the International Convention for the Suppression of Counterfeiting Currency and counterfeiting of the euro referred to in article 8 paragraph 2 of Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA

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<sup>18</sup> Dan Helenius, *Straffrättslig jurisdiktion* (Suomalainen Lakimiesyhdistys 2014) 152–153.

<sup>19</sup> *ibid.*

<sup>20</sup> PO Träskman, 'Äppel eller Pärön? Om de straffrättsliga jurisdiktionsreglernas riktiga hemvist', in Petri Jääskeläinen, Pekka Koskinen and Martti Majanen (eds) *Rikosoikeudellisia kirjoituksia VIII. Raimo Lahdelle 12.1.2016 omistettu* (Suomalainen Lakimiesyhdistys 2006) 475.

<sup>21</sup> Helenius (n 18) 114.

<sup>22</sup> *ibid* 116.

- (2) crimes against humanity and aggravated crimes against humanity, war crimes and aggravated war crimes (in accordance with the Rome Statute of the International Criminal Court)
- (3) genocide and preparation of genocide (in accordance with the UN Convention on the Prevention and Punishment of the Crime of Genocide)
- (4) narcotics offence, aggravated narcotics offence, preparation of a narcotics offence, promotion of a narcotics offences, promotion of an aggravated narcotics offence, and concealment offence as referred to in the Single Convention on Narcotic Drugs of 1961, the Protocol amending the Single Convention on Narcotic Drugs of 1961, the Convention on psychotropic substances and the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances
- (5) hijacking of an aircraft or another punishable act, whereby a person by violence or a threat of violence or otherwise unlawfully takes control or watch of an aircraft (in accordance with the UN Convention for the Suppression of Unlawful Seizure of Aircraft)
- (6) traffic sabotage, aggravated sabotage, preparation of endangerment or another punishable act constituting an offence in accordance with the UN Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
- (7) intentional manslaughter, kidnapping or other attack upon the person or liberty of an internationally protected person or a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person or a threat to commit any such attack in accordance with the UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents
- (8) hostage taking or other offences against personal liberty referred to in the International Convention Against the Taking of Hostages
- (9) torture or another act considered equivalent to torture in accordance with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- (10) a nuclear device offence, endangerment of health, a nuclear energy use offence or another punishable act against or with the help of nuclear energy that is considered an offence in accordance with the IAEA Convention on the Physical Protection of Nuclear Material
- (11) deprivation of personal liberty and aggravated deprivation of personal liberty, kidnapping, sabotage, negligent endangerment or another act that is considered an offence in accordance with the European Convention on the Suppression of Terrorism
- (12) manslaughter, assault, deprivation of personal liberty or robbery directed at a person on board a vessel or an aircraft or hijacking, theft of or causing of criminal damage to a vessel or an aircraft or property on board a vessel or an aircraft that is to be considered as piracy in accordance with UN Convention on the Law of the Sea
- (13a) offences against the prohibition of chemical weapons referred to in the UN Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction

(13b) breach of the prohibition against the use of Anti-Personnel Mines in accordance with the UN Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction

(14) offences against the prohibition on biological weapons in accordance with the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare and the UN Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction

(15) offences against the safety of fixed platforms located on the continental shelf referred to in the UN Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf

(16) offences against the personnel of the United Nations and Associated Personnel as referred to in the UN Convention on the Safety of United Nations and Associated Personnel

(17) offences directed at a public place, Government or other public facility, public transportation or infrastructure facility in accordance with the UN Convention for the Suppression of Terrorist Bombings

(18) financing of terrorism in accordance with the UN Convention for the Suppression of the Financing of Terrorism

(19) intentional killing of civilian persons or causing of serious injury in accordance with the revised Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices

(20) nuclear terrorism in accordance with the UN Convention for the Suppression of Acts of Nuclear Terrorism.

#### 1.4 Statistics

Statistics on prosecutions, sentences and punishments are drawn up by Statistics Finland.<sup>23</sup> The numbers of imposed corporate fines during the years 2009–2015 were the following: 37 (2009), 28 (2010), 29 (2011), 44 (2012), 40 (2013), 31 (2014) and 45 (2015).

## 2 Holding corporations accountable – the jurisdictional issue

### 2.1 General aspects of jurisdiction

According to the preparatory works to Chapter 1 CC, criminal law is fundamentally a national branch of law.<sup>24</sup> When the right to punish is exercised by a State, it is natural that this right is primarily reserved for the State where the offence has been committed. Norms of international law, however, restrict the State's possibilities of applying its criminal law to offences committed abroad. The point of departure when it comes to international law is that every State is sovereign within its own territory. As a general principle, it is therefore prohibited to intervene in acts committed in another State's territory. Punishing an offence that has been committed within another State's territory can under certain conditions be

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<sup>23</sup> <[http://www.stat.fi/til/oik\\_en.html](http://www.stat.fi/til/oik_en.html)> accessed 20 March 2017.

<sup>24</sup> Government Bill HE 1/1996 vp 4.

regarded as an intervention in that State's internal affairs and thus to constitute a breach of international law.

However, the restrictions based on the international principle of State sovereignty have gradually given way for the notion of international solidarity. The combating of criminality and the aim of punishing all offenders for their offences is essentially in every State's interest. In many cases, international law allows national law to be applied to offences committed abroad. In certain cases, it even presupposes it. However, when enacting legislation on the application of Finnish criminal law, international law has to be taken into consideration. Every State has the freedom to form the scope of application of its criminal law in accordance with the State's own criminal law policy. This freedom is, however, restricted by the risk of violating other States' sovereignty, as well as certain international conventions that require the contracting States to, when necessary, apply their criminal law to those international offences covered by the convention. When prescribing norms on criminal jurisdiction, it is deemed necessary for Finland not to extend the scope of application of its criminal law further than what would be allowed by international law, but also not to restrict this scope so that it would conflict with those international agreements that Finland is bound by.

As regards the possibilities of exercising criminal jurisdiction over offences committed in the operations of Finnish corporations abroad, chapter 1, section 9 CC states that, if, under this chapter, Finnish law applies to the offence, Finnish law applies also to the determination of corporate criminal liability. This entails that Finnish criminal law has to be applicable to the offence committed in the operations of a corporation in order for the corporation to be held criminally liable.<sup>25</sup> Consequently, it is not sufficient that a corporation has, as such, violated its duty to observe the necessary care and diligence in order to prevent an offence abroad if the offence does not fall within the Finnish criminal law's scope of application. Neither can Finnish criminal law be applied solely on the basis that an offence has been committed abroad for the benefit of a corporation.<sup>26</sup>

At the same time, the general requirements for corporate criminal liability in chapter 9 CC also have to be met in order for a corporation to be held liable according to Finnish law. First of all, the offence has to be one for which corporate criminal liability is prescribed. If this is not the case, it is irrelevant that Finnish criminal law can otherwise be applied to the offence. Furthermore, the perpetrator has to either belong to the management of the corporation or be in a service or employment relationship with it or act on assignment by a representative of the corporation. Consequently, a person belonging to one of these groups has to commit an offence to which the Finnish criminal law is applicable.<sup>27</sup>

## 2.2 Territorial jurisdiction

The principle of territoriality constitutes the starting point for the applicability of Finnish criminal law. The principle is rooted in the sovereignty of the State and the equality of States

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<sup>25</sup> Government Bill HE 1/1996 vp 24.

<sup>26</sup> Government Bill HE 53/2006 vp 16.

<sup>27</sup> Helenius (n 3) 779.

flowing from international law. Thus, the State where the offence is committed is deemed to have primary jurisdiction over the offence. The *locus delicti*, therefore, constitutes the 'substantial link' between the State and the offence. In a way, the whole penal system is constructed in consideration of the State territory. Within the State's own territory, its criminal jurisdiction in a sense exists per definition.<sup>28</sup> The normative rule stemming from the principle of territoriality can also be regarded as justified from a criminal policy perspective. The material and immaterial damage caused by an offence is generally most perceivable at the place of commission. In virtue of the principle of territoriality, a State strives to uphold the social order on its territory and safeguard the interests that are protected by its criminal law.<sup>29</sup> Naturally, criminal proceedings are generally also easier to conduct when investigative and judicial authorities as well as the defendant, victims and witnesses are present in the same State and when these speak the same language. The relevant evidentiary material is usually also easiest to collect on the territory of the State of commission.<sup>30</sup>

### 2.2.1 *Legal framework*

The principle of territoriality is laid down in c 1, s 1 CC, according to which: 'Finnish law applies to an offence committed in Finland.'

The application of the principle of territoriality is dependent on where the offence is deemed to have been committed. Therefore, it is essential to first establish the place of commission of the offence. C 1, s 10 CC concerns the 'place of commission', and specifies when an offence is deemed to have been committed in Finland. According to para 1 of said section:

An offence is deemed to have been committed both where the criminal act was committed and where the consequence contained in the statutory definition of the offence became apparent. An offence of omission is deemed to have been committed both where the perpetrator should have acted and where the consequence contained in the statutory definition of the offence became apparent.

As can be seen, this provision expresses the principle of ubiquity.<sup>31</sup> It firstly concerns offences committed through active conduct. The place of commission is regarded as both the place where the criminal act was committed ('subjective territoriality') and where the consequence contained in the statutory definition of the offence became apparent ('objective territoriality'). If the act was committed in one country and the consequence of the act became apparent in another country, both countries therefore have jurisdiction over the offence based on the principle of territoriality. When determining the place of commission, the consequences of the offence are of relevance only when they are contained in the statutory definition of the offence. For example, if a fraud has been committed abroad in the operations of a corporation and caused economic loss (c 36, s 1 CC) in Finland, the offence

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<sup>28</sup> Dan Helenius, 'The If, How, and When of Criminal Jurisdiction: What is Criminal Jurisdiction Anyway?' *Bergen Journal of Criminal Law and Criminal Justice* 1/2015, 30 < [boap.uib.no/index.php/BJCLCJ/article/view/831/779](http://boap.uib.no/index.php/BJCLCJ/article/view/831/779) > accessed 20 March 2017.

<sup>29</sup> Government Bill HE 1/1996 vp 4-5.

<sup>30</sup> Helenius (n 18) 297.

<sup>31</sup> Helenius (n 18) 300.

can be located to Finland. However, the mere causing of e.g. economic loss is not sufficient for the localization of an offence if this consequence is not part of the statutory definition of the offence.

Secondly, para 1 concerns offences of omission. An offence of omission is firstly deemed to have been committed where the perpetrator should have acted. Secondly, if the statutory definition of an offence of omission requires a certain consequence, the place of omission, as with offences committed through active conduct, is regarded as the place where the consequence became apparent. An offence of omission is therefore deemed to have been committed in Finland if the perpetrator should have acted there and if the consequence of the offence became apparent there. The provision, accordingly, concerns both so-called *genuine omissive* offences and *non-genuine omissive* offences.<sup>32</sup> For example, if a person belonging to the management of a corporation or who is in an employment relationship with a corporation should have acted in Finland in order to prevent a certain consequence, Finland can be regarded as the place of commission.<sup>33</sup>

C 1, s 10 CC further defines the place of commission in cases of attempt. According to para 2 of said section

If the offence remains an attempt, it is deemed to have been committed also where, had the offence been completed, the consequence contained in the statutory definition of the offence either would probably have become apparent or would in the opinion of the perpetrator have become apparent.

The place of commission is primarily deemed to be the place where the attempted offence was committed. Alternatively, the place of commission can also be regarded as the place where, had the offence been completed, the consequence contained in the statutory definition of the offence either would probably have become apparent or would in the opinion of the perpetrator have become apparent. As with completed offences, only consequences contained in the statutory definition of the offence are of relevance. When assessing where the consequences of the offence would have become apparent, the provision consists of two alternative criteria. The first one is an objective *ex post facto* probability calculation and the second one is the perpetrators subjective *ex ante* perception. According to the preparatory works to the provisions on criminal jurisdiction in the Criminal Code, it is necessary to take the subjective perception of the offender into account in order for Finnish law to be applicable also in cases where the offender intended the consequences of an offence to become apparent in Finland, but where these consequences by mere chance became apparent in a foreign country.<sup>34</sup> The provision also applies to attempts committed in the operations of a corporation.<sup>35</sup>

C 1, s10, para 3 CC contains a specific provision on criminal complicity. According to this provision

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<sup>32</sup> Frände (n 1) 308.

<sup>33</sup> Helenius (n 3) 780.

<sup>34</sup> Government Bill HE 1/1996 vp 25.

<sup>35</sup> Jaatinen (n 11) 73.

An offence by an inciter and abettor is deemed to have been committed both where the act of complicity was committed and where the offence by the offender is deemed to have been committed.

In this regard, Finnish criminal law adheres to the principle of accessory according to which criminal responsibility for complicity is dependent on the punishability of the main offence. This implies that a person inciting or abetting an act committed abroad can be held criminally responsible only when this act constitutes an offence according to Finnish law. The provision does, however, also give the place of the act of complicity an independent meaning as an alternative place of commission.<sup>36</sup>

This provision could particularly be of relevance when an offence has been committed abroad on behalf or for the benefit of a corporation, and the management of the corporation has either incited or abetted the offence in Finland. In this case, the offence can be located to Finland, provided that Finnish criminal law can also be applied to the main offence committed abroad. However, it is not necessary that charges can also be brought against the principal offender, which can be due to e.g. that he/she cannot be extradited to Finland.<sup>37</sup>

Lastly, c 1, s 10 para 4 contains a complementary provision on account of cases where the place of commission cannot be established with certainty. According to this provision:

If there is no certainty as to the place of commission, but there is justified reason to believe that the offence was committed in the territory of Finland, said offence is deemed to have been committed in Finland.

### 2.2.2 High Court jurisprudence

Due to the principle of legality, the Finnish courts are bound by the wording of the criminal legislation. This also applies to the rules on jurisdiction. Consequently, the courts cannot broaden the interpretation of where an offence is deemed to have been committed beyond the wording of c 1, s 10 CC. However, both the concept of 'objective territoriality' and 'subjective territoriality' are manifested in this provision (see above C.2.a).

The Finnish Supreme Court has not interpreted the provision in Ch. 1, sec. 10 CC on many occasions. One rather recent case that can be mentioned is the Supreme Court ruling KKO 2015:90. The case concerned whether or not the offence of 'abuse of insider information' could be seen to have been committed in Finland. The trade of options relating to Finnish shares had been cleared and registered at the Stockholm stock exchange in Sweden. However, the Supreme Court considered that the actual use of insider information had taken place in Finland, *inter alia* because the options concerned shares in a Finnish company that were subject to public trade at the Helsinki stock exchange. The options had also been acquired by a market maker situated in Helsinki. Thus, the offence was deemed to have been committed in Finland.

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<sup>36</sup> Government Bill HE 1/1996 vp 25.

<sup>37</sup> Helenius (n 3) 780–781.

## 2.3 Extraterritorial jurisdiction

The principle of territoriality is regarded as the basis for Finland's criminal jurisdiction, whereupon Finnish criminal law is primarily only applicable to offences committed on Finnish territory. However, the principle of territoriality does not entail exclusive territorial jurisdiction and thus a prohibition for states to claim jurisdiction over other acts than those committed on its own territory. Under certain circumstances, Finland has also established criminal jurisdiction extraterritorially.

Extraterritorial jurisdiction is, in a way, regarded as an exception to territorial jurisdiction, and therefore requires further justification.<sup>38</sup> If an offence cannot be deemed to have been committed in Finland, i.e. an extraterritorial act, the applicability of Finnish criminal law requires that the act otherwise has some kind of connection to Finland. The connections that entitle Finland to apply its criminal law to offences committed abroad are regulated through the so-called rules on connection. These rules express certain internationally accepted principles of jurisdiction, whereupon it is also common to call these rules by the principles they express.<sup>39</sup> These principles of extraterritorial jurisdiction should not necessarily be regarded as exceptions to the principle of territoriality but rather as complements to it.<sup>40</sup> At least on the legislative level, these principles should be regarded as having an equal 'rank', since they only concern whether or not Finnish criminal law is applicable in accordance with international standards. However, on the judicial level, i.e. when applying criminal law in a concrete case, the principles (and the connections they express) must be weighed against principles that are invoked by other States with conflicting claims on criminal jurisdiction.<sup>41</sup> In this context, for instance, Finland's interest in applying its criminal law based on the principle of active personality would in most cases, most likely, be higher than its interest in applying the principle of passive personality. The situation, nevertheless, has to be examined from case to case.

Notwithstanding the possibilities of claiming extraterritorial jurisdiction, the yearly number of offences committed outside of Finland that are dealt with by Finnish courts has not been very high. As a main rule, offences committed abroad may not be investigated in Finland without a prosecution order by the Prosecutor-General (see chapter 3). The yearly number of such orders has been around ten.<sup>42</sup>

### 2.3.1 *Active personality principle*

#### *Generally*

The principle of active personality is laid down in c 1, s 6 CC, according to which

- (1) Finnish law applies to an offence committed outside of Finland by a Finnish citizen. If the offence was committed in territory not belonging to any State, a

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<sup>38</sup> Helenius (n 18) 296.

<sup>39</sup> *ibid* 228–244.

<sup>40</sup> *ibid* 313–314.

<sup>41</sup> *ibid* 407.

<sup>42</sup> See Government Bill 1/1996 vp 14 and Helenius (n 18) 2.

precondition for the imposition of punishment is that, under Finnish law, the act is punishable by imprisonment for more than six months.

(2) A person who was a Finnish citizen at the time of the offence or is a Finnish citizen at the beginning of the court proceedings is deemed to be a Finnish citizen.

(3) The following are deemed equivalent to a Finnish citizen:

- (1) a person who was permanently resident in Finland at the time of the offence or is permanently resident in Finland at the beginning of the court proceedings, and
- (2) a person who was apprehended in Finland and who at the beginning of the court proceedings is a citizen of Denmark, Iceland, Norway or Sweden or at that time is permanently resident in one of those countries.

According to the preparatory works of the provisions on the application of Finnish criminal law, the principle of active personality is first and foremost based on the international principle of *aut dedere, aut judicare*.<sup>43</sup> According to chapter 1, section 9 of the Constitution of Finland (731/1999), Finnish citizens shall not be prevented from entering Finland or be deported or extradited or transferred from Finland to another country against their will. As a consequence of this general ban on extradition of Finnish nationals, the scope of application of Finnish criminal law is extended to offences committed by Finns in the territory of a foreign State, since they could otherwise escape criminal liability. It should, however, be noted that also Finnish citizens can, under certain circumstances, be extradited from Finland to another Nordic country or Member State in the European Union.

The principle of active personality is not absolute but subject to further conditions. According to c 1, s 11, para 1 CC, Finnish criminal law can only be applied to an offence committed by a Finn in the territory of a foreign State based on the principle of active personality, 'when the offence is punishable also under the law of the place of commission and a sentence could have been passed for it also by a court of that foreign State. In this event, no sanction that is more severe than what is provided by the law of the place of commission shall be imposed in Finland.'

According to c 1, s 11, para 1 CC, double criminality implies that the offence is punishable also under the law of the place of commission and a sentence could have been imposed also by a court of that foreign State. Consequently, double criminality is not only required *in abstracto* but *in concreto*. It is therefore not sufficient that the act or type of act as such is punishable. The provision expressly requires that the offender could also have been sentenced for the same act at the place of commission. A Finnish court, therefore, has to consider both criminal (e.g. justifying and excusable grounds) and procedural norms (e.g. if the prosecution of the offence is time-barred) as well as case law of the place of commission, by reason of which a sentence could not have been imposed by a court there.<sup>44</sup>

C 1, s 11 does, however, prescribe certain exceptions to the requirement of double criminality. According to para 2 of said section, even if the offence is not punishable under

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<sup>43</sup> Government Bill HE 1/1996 vp 21.

<sup>44</sup> Report by the Parliament's Legal Affairs Committee, LaVM 4/1996, 3.

the law of the place of commission, Finnish law applies to it if it has been committed by a Finnish citizen (or a person equated with Finnish citizens) and the offence is *inter alia* a war crime or aggravated war crime referred to in article 15 of the second protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict or an act of participation into said acts, an offence against administration of justice (e.g. false statement, false denunciation, falsification of evidence and threatening a person to be heard in the administration of justice) by the International Criminal Court, distribution of sexually obscene pictures, aggravated distribution of sexually obscene pictures depicting children and possession of sexually obscene pictures depicting children, sexual abuse of a child, aggravated sexual abuse of a child and purchase of sexual services from a young person, pandering and aggravated pandering, if the act is directed at a person below the age of eighteen years.

Consequently, the principle of active personality is primarily not regarded as an expression of Finnish citizens' allegiance to and compliance with the Finnish legislation while abroad, but is rather based on international solidarity. When applying the principle of active personality, the conduct shall primarily be assessed according to the criminal legislation of the place of commission. However, some legal interests (such as the protection of children) are regarded as so important that they should be protected regardless of the legislation at the place of commission, in which case double criminality is not required. As regards especially sexual offences directed at children, the criminal regulation may still have gaps in some countries. In these cases, Finnish citizens are not afforded the right to behave completely in accordance with the freedoms provided at the place of commission and are subjected to Finland's criminal jurisdiction also based on their obligation to comply with Finnish legislation.<sup>45</sup>

If the offence has been committed in a territory not belonging to any State (for instance the high sea or the Antarctic), a precondition for the imposition of punishment is that, under Finnish law, the act is punishable by imprisonment for more than six months. In these cases, the extension of Finnish criminal law to offences outside of Finland has only been deemed necessary as regards fairly serious offences.<sup>46</sup>

As regards the question of citizenship, the time of the offence as well as the beginning of the court proceedings is of relevance. The aim is that no one should avoid criminal responsibility by changing their citizenship after the time of the offence. Problems could arise in e.g. situations where the perpetrator during the time between the commission of the offence and the beginning of the court proceedings has gained Finnish citizenship. Such a person is considered equivalent to a person who was a Finnish citizen at the time of the offence. This is partly due to the fact that a decision on extradition of a person who has gained Finnish citizenship after committing an offence is made on the same grounds as regarding other

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<sup>45</sup> Helenius (n 18) 268–269 and 320–322.

<sup>46</sup> Government Bill HE 1/1996 vp 21.

Finnish citizens. Furthermore, a person who has gained Finnish citizenship usually has a closer connection to Finland than to the place of commission.<sup>47</sup>

A person who was permanently resident in Finland at the time of the offence or is permanently resident in Finland at the beginning of the court proceedings is deemed equivalent to a Finnish citizen (the so-called domicile principle). This is based on the notion that such a person, irrespective of his or her citizenship, usually has a closer connection to Finland than to the place of commission. A person is regarded as a permanent resident of Finland if that person has taken residence in Finland other than temporarily.<sup>48</sup>

Furthermore, a person who was apprehended in Finland and who at the beginning of the court proceedings is a citizen of Denmark, Iceland, Norway or Sweden or at that time is permanently resident in one of those countries is also deemed equivalent to a Finnish citizen. The Nordic countries have in relation to their accession to certain international treaties, such as the European Convention on Extradition of 1957, declared that they regard nationals of the other Nordic countries and persons domiciled in those countries as equal to their own nationals. The Criminal Codes of other Nordic countries also contain similar provisions.<sup>49</sup>

#### *Corporations and the active personality principle*

Finnish legislation does not explicitly state whether a corporate fine can only be imposed on 'Finnish' corporations. The presumption should at least be that legal persons who are not recognized by the Finnish legal system (e.g. trusts) cannot be held criminally liable.<sup>50</sup> Furthermore, the presumption should also be that the legal person must have a sufficiently close connection to Finland in order for Finnish criminal law to apply. Firstly, this can be the case when the legal person is founded in Finland, i.e. registered in Finland. Secondly, criminal liability should also apply when a corporation's head office is located in or primary place of business takes place in Finland.<sup>51</sup>

If an offence is committed abroad at a fixed office of a Finnish corporation, liability can ensue if all other conditions for corporate criminal liability are met. The situation becomes more complicated when an offence is committed abroad in the operations of a subsidiary to a Finnish parent company, and even more so if it is committed in the operations of a subcontractor or supplier of a Finnish company.<sup>52</sup> In principle, a subsidiary is a separate legal person from the parent company, which can be wholly or partly owned by and commanded by the parent company. Some legislation (e.g. on environmental damages) contains explicit provisions on the parent company's liability for transgressions of law by a

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<sup>47</sup> *ibid.*

<sup>48</sup> *ibid.*

<sup>49</sup> Thomas Elholm and Birgit Feldtman, 'Nordic trends of jurisdiction – An international perspective', in Thomas Elholm and Birgit Feldtman (eds.), *Criminal Jurisdiction – A Nordic Perspective* (DJØF Publishing 2014) 149–150.

<sup>50</sup> Jaatinen (n 11) 165–166.

<sup>51</sup> Helenius (n 3) 775.

<sup>52</sup> In detail, Työ- ja elinkeinoministeriön julkaisu 14/2015 (Publication by the Ministry of Economic Affairs and Employment), Suomen lainsäädäntö, kansainvälinen liiketoiminta ja ihmisoikeudet (Finland's legislation, international business and human rights) 22–27.

subsidiary. The requirement is then generally that the transgression is committed on behalf of the parent company or under the command of the parent company. Arguably, it should be possible to hold a parent company responsible for an offence committed abroad in the operations of a subsidiary if the offence is committed on behalf or for the benefit of the parent company and the management of the parent company has contributed to the offence as stipulated by the Finnish CC.<sup>53</sup> However, the legislation on this matter is in no way clear. As regards the relationship between companies and subcontractors or suppliers abroad, it seems even more difficult to hold the company liable for any legal violations committed in the operations of the latter. This is due not only to legal but also evidentiary reasons.<sup>54</sup>

The provisions on active personality in c 1, s 6 CC do not, as such, apply to offences committed abroad by Finnish corporations in the same way as c 1, s 5 concerns also offences directed at Finnish legal entities.<sup>55</sup> An offence can, in addition to natural persons, also be directed at legal persons, and the passive personality principle has thus, quite understandably, been extended also to Finnish legal persons. The situation is, however, different as regards offenders.

Since legal persons are not regarded as actual offenders according to the Finnish system, equating Finnish legal persons with Finnish citizens would not be legally possible. The active personality principle can only function as a basis for corporate criminal liability in situations where a Finnish citizen (or a person equated with Finnish citizens) commits an offence abroad in the operations of a corporation. Consequently, c 1, s 6 CC cannot by analogy be applied to an offence committed in the operations of a corporation that is registered in Finland if a natural person that has committed the offence is not a Finnish citizen.

### 2.3.2 *Passive personality principle*

The principle of passive personality is laid down in c 1, s 5 CC, according to which Finnish law applies to an offence committed outside of Finland that has been directed at a Finnish citizen, a Finnish corporation, foundation or other legal entity, or a foreigner permanently resident in Finland if, under Finnish law, the act is punishable by imprisonment for more than six months.

According to the preparatory works, the legislation of the place of commission in most cases offers a sufficiently effective protection for Finnish citizens, foreigners permanently resident in Finland and Finnish legal entities. In order to avoid situations where fairly severe offences directed at these groups would remain unpunished, it has nevertheless been regarded as justified to lay down provisions based on the principle of passive personality.<sup>56</sup>

According to the provisions in c 1, s 5 CC, Finnish law applies to an offence committed outside of Finland that has been directed at a Finnish citizen, a Finnish corporation,

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<sup>53</sup> Helenius (n 3) 775.

<sup>54</sup> Työ- ja elinkeinoministeriön julkaisu 14/2015, Suomen lainsäädäntö, kansainvälinen liiketoiminta ja ihmisoikeudet (Finland's legislation, international business and human rights) 26.

<sup>55</sup> Helenius (n 3) 782.

<sup>56</sup> Government Bill HE 1/1996 vp 20.

foundation or other legal entity, or a foreigner permanently resident in Finland.<sup>57</sup> As with the active personality principle, a person is regarded as permanently resident in Finland if that person has taken residence in Finland other than temporarily.

The scope of application of Finnish criminal law is in this case, however, restricted to fairly serious offences directed at Finns. The principle of passive personality can only be applied if, under Finnish law, the act is punishable by imprisonment for more than six months. This requirement refers to the highest maximum punishment imposed for the act, not to the concrete punishment that would be handed down for the offence with all circumstances taken into consideration. Lesser offences are, therefore, left outside the scope of application of the principle of passive personality.

The scope of application of the principle of passive personality is, furthermore, restricted by the requirement of double criminality. According to c 1, s 11, para 1 CC, Finnish criminal law can only be applied to an offence committed in the territory of a foreign State and directed against a Finnish citizen, a Finnish corporation, foundation or other legal entity, or a foreigner permanently resident in Finland based on the principle of passive personality, 'when the offence is punishable also under the law of the place of commission and a sentence could have been passed for it also by a court of that foreign State. In this event, no sanction that is more severe than what is provided by the law of the place of commission shall be imposed in Finland.' As with the principle of active personality, double criminality has to be fulfilled not only *in abstracto* but also *in concreto*.

As regards corporate criminal liability, it could in principle be applied in all situations where a foreign national has directed an offence at a Finnish citizen or comparable person in the operations of a corporation abroad, provided that corporate criminal liability is prescribed for the offence in question and all other requirements for corporate criminal liability are fulfilled.

### 2.3.3 *Protective principle*

The protective principle (or principle of state protection) principle is laid down in Ch. 1, sec. 3 CC ('Offence directed at Finland'), according to which

- (1) Finnish law applies to an offence committed outside of Finland that has been directed at Finland.
- (2) An offence is deemed to have been directed at Finland
  - (1) if it is an offence of treason or high treason,
  - (2) if the act has otherwise seriously violated or endangered the national, military or economic rights or interests of Finland, or
  - (3) if it has been directed at a Finnish authority.

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<sup>57</sup> The Finnish provisions on active and passive personality can be seen to encompass both the nationality principle and the domicile principle, since they apply to Finnish citizens as well as foreigners permanently resident in Finland. See P.O. Träskman, *Straffrättsliga åtgärder vid brott med främmande inslag I – En granskning av den finska straffrättens tillämpningsområde* (Juridiska föreningen i Finland 1977) 136–142.

Foreign States cannot be presumed to offer sufficient protection of Finnish public or State interests. The criminal provisions protecting these interests are often nationally restricted, which implies that only acts directed at the State's own interests are punishable.<sup>58</sup>

According to para. 1, Finnish law applies to an offence committed outside of Finland that has been directed at Finland. In many cases, these offences will fall under the scope of application of Finnish criminal law already because the consequence of the offence becomes apparent in Finland, which implies that it is regarded as being committed in Finland in accordance with c 1, s 10 CC. The provision laying down the principle of protection was, however, considered necessary in order to ensure that Finnish criminal provisions can be applied also when an offence cannot be deemed to have been committed in Finland. The application of the provision does not presuppose that the act was also punishable under the law of the place of commission. Double criminality is, therefore, not required.

According to the preparatory works, the requirement of legal security demands that the principle of protection is restricted through provisions that are as precise as possible.<sup>59</sup> These should, if possible, be as detailed and exact as possible, and include e.g. an exhaustive list of offences that the provision applies to. This solution was, however, considered difficult as regards legislation technique, and it would also be arduous to update such a provision. Both of these aspects were, however, taken into consideration as far as possible.

According to para 2(1), an offence is, firstly, deemed to have been directed at Finland if it is an offence of treason or high treason. The statutory definitions of treasonable offences are found in c 12 CC. These offences include: compromising the sovereignty of Finland, incitement to war, treason and aggravated treason, espionage and aggravated espionage, disclosure of a national secret and negligent disclosure of a national secret, unlawful intelligence operations, violation of the rules of neutrality and treasonable conspiracy. The statutory definitions of high treason are found in c 13 CC. These offences include: high treason and aggravated high treason, preparation of high treason and unlawful military operations.

According to para 2(2), an offence is, secondly, deemed to have been directed at Finland if the act has otherwise seriously violated or endangered the national, military or economic rights or interests of Finland. These interests can be violated through acts fulfilling several statutory definitions. Examples of acts that can be seen to violate the national interests of Finland could be e.g. giving of bribes and certain forgery offences. The economic rights or interests of Finland can, in turn, be violated through e.g. different regulation offences, fishing offences committed within the fishing zone of Finland and environmental offences.<sup>60</sup>

The provision in para 2(2) only concerns offences that seriously violate one of the interests mentioned in said provision. Pettier forms of offences are not as detrimental from society's perspective that it would be necessary to apply Finnish criminal law to them when committed abroad. The assessment of the seriousness of the offence has to be made from

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<sup>58</sup> Government Bill HE 1/1996 vp 18.

<sup>59</sup> *ibid* 18.

<sup>60</sup> *ibid* 19.

case to case. The offence can be considered to be directed at Finland only when the object of the offence is a right or an interest that can only be held by the State. If the offence is directed at an interest that can also be held by someone else than the State, the act shall not be assessed according to c 1, s 3 CC but in light of the other provisions on the applicability of Finnish criminal law.

According to para 2(3), an offence is, thirdly, deemed to have been directed at Finland if it has been directed at a Finnish authority. Offences directed at Finnish authorities are considered to be directed at the person acting as an authority as well as the Finnish State itself.<sup>61</sup> The purpose of this provision is to protect vital State interests. This was not deemed possible without a specific provision, because difficulties of interpretation could otherwise arise concerning whether or not the conditions for applying some of the other provisions on the application of Finnish criminal law are met. By authorities, Finnish State authorities are implied. Furthermore, it is required that the offence is directed at an authority currently exercising public authority.

As regards corporate criminal liability, para 2(2) is mainly of relevance. Offences of treason or high treason do not fall within the scope of corporate criminal liability. The principle of protection could, for instance, be applied if a bribery offence or an environmental offence is directed at Finland from abroad in the operations of a corporation.

#### 2.3.4 *Jurisdiction over military personnel and/or private military contractors*

As regards offences in public office and military offences, a specific provision is included in c 1, s 4 CC:

(1) Finnish law applies to an offence referred to in chapter 40 of this Code [Offences in Office] that has been committed outside of Finland by a person referred to in chapter 40, section 11, paragraphs (1), (2), (3) and (5) (604/2002).

(2) Finnish law also applies to an offence referred to in chapter 45 [Military Offences] that has been committed outside of Finland by a person subject to the provisions of that chapter.

Establishing criminal jurisdiction over offences in public office and military offences committed abroad is considered necessary, because these offences are considered to be directed directly at the State or a public body. Generally, public officials and members of the armed forces are Finnish citizens and, thus, the provision concerning offences committed by Finnish citizens abroad would also apply to offences in public office and military offences. However, as regards the last-mentioned offences, a specific provision on the scope of application of Finnish criminal law was deemed necessary, since the provisions on offences in public office and military offences are nationally restricted, signifying that the requirement of double criminality would not be fulfilled.<sup>62</sup> A public official may be a citizen of another country than Finland or a person that is deemed equivalent to a Finnish citizen (e.g. a person who is permanently resident in Finland).

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<sup>61</sup> *ibid* 19.

<sup>62</sup> *ibid* 19.

According to the para 2 of c 1, s 4 CC, Finnish criminal law applies to military offences referred to in chapter 45 CC that have been committed outside of Finland by a person subject to the provisions of that chapter. According to international law, the criminal law of the State of residence can generally not be applied to military offences committed by soldiers of a foreign country. On grounds connected to the sustainment of order and general preventive reasons, it has been regarded as justified to extend the applicability of Finnish criminal law to military offences committed abroad by Finnish soldiers and other persons referred to in chapter 45 CC. The need for such a provision is also emphasized by the fact that, according to section 5 of the Finnish Extradition Act, it is not possible to extradite a person that has committed a military offence, other than from one Nordic country or Member State of the European Union to another.<sup>63</sup>

According to c 45, s 27 CC, soldiers are firstly defined as the regular personnel of the armed forces and the temporary personnel of the armed forces, the latter when appointed to military duties. Secondly, soldiers are defined as conscripts performing armed or unarmed national service or those performing the service referred to in sec. 79 of the National Service Act (1438/2007), and those performing the service referred to in the Act on the Voluntary National Service for Women (194/1995) and persons serving in voluntary exercises of the armed forces referred to in sec. 18 of the Voluntary National Defence Act (556/2007) and trainers and persons in command of artillery exercises referred to in sec. 21 of said Act. Soldiers are, thirdly, defined as cadets being trained for regular service in the armed forces. In addition, the provisions on soldiers apply, as separately provided by law, also to the military personnel of the frontier guard service and to the personnel undergoing crisis management training, engaged in crisis management exercises or performing crisis management service referred to in the Military Crisis Management Act (211/2006). In addition, the provisions of chapter 45 apply, as separately provided in the Act on Voluntary National Defence, to volunteers participating in armed forces executive assistance duties, as referred to in section 23 of said Act. During wartime, the scope of application of chapter 45 CC is also extended to certain specified groups of persons other than soldiers. It can be noted that offences committed by persons undergoing Finnish non-military service in accordance with the Finnish Non-Military Service Act (1055/1996) are not covered by the provisions in c 1, s 4, para 2 CC. Non-military service is as a rule carried out in Finland, and an offence committed by a person undergoing non-military service can usually be regarded as having been committed in Finland in accordance with the provisions in c 1, s 10 CC.

C 1, s 4, para 2 CC concerns only offences that are prescribed in chapter 45 CC. The application of Finnish criminal law to other kinds of offences committed abroad by Finnish soldiers is determined based on other provisions on the scope of application of Finnish criminal law in chapter 1 CC.

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<sup>63</sup> *ibid* 20.

### 2.3.5 Vicarious jurisdiction

The principle of vicarious jurisdiction (or principle of representational jurisdiction) is laid down in c 1, s 8 CC, according to which:

Finnish law applies to an offence committed outside of Finland which, under Finnish law, may be punishable by imprisonment for more than six months, if the State in whose territory the offence was committed has requested that charges be brought in a Finnish court or that the offender be extradited because of the offence, but the extradition request has not been granted.

The provision entails that Finnish criminal law can be applied to an offence when the alleged offender is present in Finland, even though the offence lacks a further connection to Finland and none of the provisions in Chapter 1, sections 1–7 CC are applicable. The idea behind the principle of vicarious jurisdiction is that the State of residence acts on ‘behalf of’ the State that has the primary jurisdictional interest in the matter.<sup>64</sup> Consequently, Finland cannot apply its criminal law on its own initiative in these types of cases. Vicarious jurisdiction is rather regarded as a form of international legal assistance and is deemed to be based mainly on international solidarity in combating criminality.<sup>65</sup> The application of c 1, s 8 CC expressly presupposes that a prosecution or extradition request is made by the State in whose territory the offence was committed.

According to c 1, s 8 CC, vicarious jurisdiction is firstly possible when the State in whose territory the offence was committed has requested that charges be brought in a Finnish court, for instance because the suspected person has already been apprehended in Finland and has been charged with also other offences. Secondly, vicarious jurisdiction is possible when such a State has requested that the offender be extradited, but the extradition request has not been granted. This can relate to the fact that the perpetrator cannot be extradited to the place of commission or that this is regarded as unsuitable.<sup>66</sup> If Finland could not claim jurisdiction in these situations, the perpetrator could escape criminal liability simply because he cannot be extradited.

Since the rationale behind vicarious jurisdiction is that the State of apprehension acts as a kind of representative for the State of commission, chapter 1, section 8 can only be applied when the requirement of double criminality is fulfilled. Apart from the requirement of double criminality and a request that charges be brought in a Finnish court or that the offender be extradited, it is also required that the offence, under Finnish law, is punishable by imprisonment for more than six months. This restriction excludes the application of Finnish law to such offences committed abroad that does not, because of their insignificance, justify the utilization Finnish authorities’ resources.<sup>67</sup>

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<sup>64</sup> Helenius (n 18) 352–358.

<sup>65</sup> Minna Kimpimäki, *Universaaliperiaate kansainvälisessä rikosoikeudessa* (Suomalainen Lakimiesyhdistys 2005) 73.

<sup>66</sup> Government Bill HE 1/1996 vp 23.

<sup>67</sup> Government Bill HE 1/1996 vp 24.

In theory, chapter 1, section 8 enables a rather broad application of Finnish criminal law. It is at least conceivable that a foreign national commits an offence abroad in the operations of a Finnish corporation without any of the provisions in c 1, ss 1–7 being applicable. If the offender is apprehended in Finland and the State of commission either requests that charges be brought in a Finnish court or that the offender be extradited, and this request is not granted, Finnish criminal law, and consequently also the Finnish rules on corporate criminal liability, could apply.

### 2.3.6 *Universal jurisdiction*

According to c 1, s 7 CC, Finnish criminal law applies to ‘international offences’. An international offence is defined as ‘an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland’. This provision is generally regarded as an expression of the principle of universality. The international agreements that define the scope of application of c 1, s 7 CC are listed in a separate Decree.

International offences are usually divided into crimes under international customary law (or so-called ‘core crimes’) and treaty-based crimes. Crimes under international customary law establish criminal responsibility directly under international customary law and enable the use of universal jurisdiction. This implies that these offences can be punished without international conventions or national legislation. However, Finnish constitutional law does not permit domestic courts to directly apply norms of international law but requires written domestic law as the basis for punishment.<sup>68</sup> c 1, s 7 CC does not make a direct reference to crimes under international customary law, but requires a basis in an international agreement in order for the principle of universality to apply. Thus, the wording mainly refers to treaty-based crimes.

Several international treaties demand that States acceding to them extend the applicability of their criminal law to those offences defined in the treaties and in the extent required by the treaties. However, most treaties do not explicitly require the State parties to extend their jurisdiction to the offences defined in them on the basis of the principle of universality. Rather, most jurisdictional requirements are based on the principle of *aut dedere, aut iudicare* that require States to shape their legislation in a way that makes it possible to either extradite an alleged offender that is found on its territory or to submit the case to its competent authorities for the purpose of prosecution. Provided that the treaty does not require double criminality or a separate initiative from the State in whose territory the offence was committed, treaties that impose an obligation of this kind on the State parties have been interpreted as entitling them to use universal jurisdiction.<sup>69</sup>

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<sup>68</sup> Minna Kimpimäki, *Kansainvälinen rikosoikeus* (Kauppakamari 2015) 30–31.

<sup>69</sup> Kimpimäki (n 65) 284–285 and Helenius (n 18) 347. The main difference between the principle of vicarious jurisdiction (c 1, s 8 CC) and the principle of universality (c 1, s 7 CC) is that the former requires both double criminality and a separate initiative from the State of commission.

Thus, c 1, s 7 CC firstly contains a general clause, according to which Finnish criminal law applies to international offences, regardless of the law of the place of commission. The provision is secondly complemented by a separate Decree that exhaustively lists the international agreements that entitle Finland to apply universal jurisdiction. This legislative technique makes it possible to flexibly modify the legislation in accordance with international obligations.<sup>70</sup> On the other hand, it has also been criticized for being clumsy and unclear, since it is not completely plain which international agreements actually entitle States to use universal jurisdiction.<sup>71</sup>

Due to international obligations, *inter alia* most narcotic offences are regarded as such international offences that entitle Finland to use universal jurisdiction. Counterfeiting currency, seizure of aircrafts, taking of hostages and torture are also regarded as international offences. The Decree also refers to crimes against humanity, aggravated crimes against humanity, war crimes and aggravated war crimes defined in the Charter of Rome of the International Criminal Court as well as genocide and the preparation of genocide referred to in the Convention on the Prevention and Punishment of the Crime of Genocide. Consequently, crimes against humanity, war crimes and genocide as international core crimes are also included in such international agreements that enable Finland to use universal jurisdiction based on c 1, s 7 CC. However, the current provisions do not enable the use of universal jurisdiction to crimes of aggression (see also chapter 2.4).<sup>72</sup>

Furthermore, c 1, s 7, para 2 CC explicitly states that, regardless of the law of the place of commission, Finnish law applies also to a nuclear explosive offence or the preparation of an endangerment offence that is to be deemed an offence referred to in the Comprehensive Nuclear Test Ban Treaty. Para 3 of said section likewise extends the applicability of the principle of universality to trafficking in persons, aggravated trafficking in persons and terrorist offences committed outside of Finland. The reason for these separate provisions has been that it is not completely clear whether universal jurisdiction is required for these offences based on international obligations (therefore, they are not included in the Decree on international offences). Finland has, however, decided to apply the principle of universality to them.<sup>73</sup>

The question of whether the exercise of universal jurisdiction requires the alleged offender's presence in Finland is not clearly regulated in the Finnish legislation. One could argue that States should be able to exercise universal jurisdiction over, at least, the international core crimes regardless of where the offender is residing.<sup>74</sup> On the other hand, one could also argue that a general requirement of presence mitigates some of the objections that are connected with the principle of universality. By requiring the presence of the offender, the exercise of universal jurisdiction would perhaps not appear completely arbitrary from his or her

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<sup>70</sup> Government Bill HE 1/1996 vp 22.

<sup>71</sup> Kimpimäki (n 65) 287.

<sup>72</sup> Government Bill HE 289/2014 vp 24.

<sup>73</sup> Kimpimäki (n 68) 562.

<sup>74</sup> Kimpimäki (n 65) 283.

perspective.<sup>75</sup> By combining the principle of universality with a general requirement of the offender's presence, one would also moderate the potential intervention in the internal affairs of the State of commission.<sup>76</sup>

The provision on universal jurisdiction has only been applied once so far in regard to international core crimes. This was done in 2010, when a national of Rwanda, residing in Finland, was sentenced to life imprisonment for genocide due to his involvement in the Rwandan genocide of 1994. Otherwise, the principle has been applied scarcely and has mainly been referred to in relation to some cross-border cases of narcotics offences.<sup>77</sup>

As regards corporate criminal liability, it should be noted that the current Finnish provisions do not provide such liability for any of the international core crimes. Corporate criminal liability does apply to *inter alia* nuclear explosive offences, trafficking in persons and aggravated trafficking in persons as well as all terrorist offences. Since universal jurisdiction is prescribed for these offences, a corporation can be held liable for them if they have been committed abroad in the operations of the corporation and all the other requirements for liability are also fulfilled.

## 2.4 Jurisdiction for prosecuting corporations under international law

### 2.4.1 *Jurisdictions prescribed by international humanitarian law – core crimes*

War crimes are criminalized in c 11, s 5 CC, according to which:

(1) A person who in connection with a war or other international or domestic armed conflict or occupation in violation of the Geneva conventions on the amelioration of the condition of the wounded and sick in armed forces in the field, the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, the treatment of prisoners of war or the protection of civilian persons in time of war (Treaties of Finland 8/1955, Geneva conventions) or the additional amendment protocols done in 1949 to the Geneva Conventions, on the protection of victims of international armed conflicts and the protection of victims of non-international armed conflicts (Treaties of Finland 82/1980, I and II protocols) or other rules and customs of international law on war, armed conflict of occupation,

(1) kills another or wounds or tortures him or her or in violation of his or her interests maims him or her or subjects him or her to a biological, medical or scientific experiment or in another manner causes him or her considerable suffering or a serious injury or seriously harms his or her health,

(2) rapes another, subjects him or her to sexual slavery, forces him or her into prostitution, pregnancy or sterilization or commits other corresponding aggravated sexual violence against him or her,

(3) destroys, confiscates or steals property arbitrarily and without military need,

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<sup>75</sup> *ibid* 129.

<sup>76</sup> Helenius (n 18) 348.

<sup>77</sup> See Kimpimäki (n 68) 565.

- (4) in connection with an assault or otherwise plunders a town or another corresponding place,
- (5) takes or recruits children below the age of 18 years into military forces or into groups in which they are used in hostilities,
- (6) forces a prisoner of war or another protected person to serve in the military forces of the enemy or participate in military action against their own country,
- (7) denies a prisoner of war or another protected person the rights to a fair and lawful trial or in another manner denies him or her legal guarantees,
- (8) initiates an attack that causes the loss of human life or injuries or extensive, long-term and serious environmental damage that are clearly excessive in comparison with the anticipated real and direct military benefit,
- (9) attacks civilian populations, civilians not taking part in hostilities or civilian targets or persons engaged in tasks referred to in the Charter of the United Nations (Treaties of Finland 1/1956) or property used by them,
- (10) attacks undefended civilian targets or bombs them, attacks places used for religious worship, science, art, medical treatment or charity or historical monuments or attacks persons who are using the symbols referred to in the Geneva conventions or the I or III protocol to the Geneva conventions,
- (11) misuses a white flag, the flag of the enemy, the flag of the United Nations, military insignia, a military uniform or the symbols referred to in the Geneva conventions or the I or III protocol to the Geneva conventions,
- (12) holds in unlawful detention or forcibly transfers or deports population or parts thereof,
- (13) takes persons as hostages, announces that no mercy shall be given, uses civilians or other protected persons in order to protect military targets, prevents civilians from receiving foodstuffs or other supplies necessary for survival or emergency assistance or uses other means of warfare prohibited in international law, or
- (14) uses poison or a poison weapon, suffocating or poisonous gases or other corresponding substances, weapons, ammunition or materiel that cause excessive injuries or unnecessary suffering, or chemical, biological or other prohibited weapons or ordnance,

shall be sentenced for a war crime to imprisonment for at least one year or for life.

(2) Also a person who commits another act defined under article 8 of the Rome Statute of the International Criminal Court (Treaties of Finland 56/2002) or in another manner violates the provisions of an international agreement on war, armed conflict or occupation that is binding on Finland or the generally recognized and established laws and customs of war in accordance with international law shall be sentenced for a war crime.

Provisions are also included in c 11 CC on aggravated war crime (s 6), petty war crime (s 7), violation of the ban on anti-personnel mines (s 7 a), breach of the prohibition of chemical weapons (s 8) and breach of the prohibition of biological weapons (s 9).

According to c 1, s 7 CC, universal jurisdiction applies to *inter alia* war crimes and aggravated war crimes as defined in the Charter of Rome of the International Criminal Court and other corresponding punishable criminal acts which should be deemed a grave breach of the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Relative to the Treatment of Prisoners of War, and Relative to the Protection of Civilian Persons in Time of War, as well as the Protocol Additional to the Geneva Conventions, and relating to the protection of victims of international armed conflicts. Universal jurisdiction is also applied to offences against the prohibition of chemical weapons referred to in the UN Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, breach of the prohibition against the use of Anti-Personnel Mines in accordance with the UN Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, offences against the prohibition on biological weapons in accordance with the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare and the UN Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (see also chapter 2.3.6).

#### 2.4.2 *Jurisdiction based on customary international law*

It is generally acknowledged that international customary law entitles States to extend their criminal jurisdiction to international core crimes directly based on the principle of universality. It was, however, not deemed necessary to include these offences in the provisions laying down the principle of universality in Ch. 1, sec. 7 CC (see chapter 2.3.6).<sup>78</sup> Neither does the Finnish Constitution allow criminal liability to be based directly on international customary law. However, provisions referring to these offences are included in international agreements that Finland has acceded to and that enable the use of universal jurisdiction according to c 1, s 7 CC.

### 3 International conflicts of jurisdiction

According to the main rule in c 1, s 12 CC, an offence committed abroad may not be investigated in Finland without a prosecution order by the Prosecutor-General. The provision constitutes a procedural requirement for the bringing of charges, not a substantive provision on the scope of application of Finnish criminal law.<sup>79</sup>

The provisions on the scope of application of Finnish criminal law render it possible to apply Finnish criminal law to a rather wide extent. This concerns also cases that do not have a particularly close connection to Finland. Offences committed outside of Finland usually also fall under the criminal jurisdiction of at least one other State, which can give rise to positive conflicts of jurisdiction. It would obviously be unreasonable for the prosecution to be mandatory for all extraterritorial offences that in principle fall within the scope of

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<sup>78</sup> Government Bill HE 1/1996 vp 23.

<sup>79</sup> *ibid* 26.

application of Finnish criminal law. Abstract applicability cannot categorically lead to concrete application. Prosecuting extraterritorial offences, thus, inevitably requires further balancing and deliberation. Consequently, a procedure has been deemed necessary in order to examine in each individual case whether or not it is appropriate to initiate proceedings in Finland.<sup>80</sup>

This mechanism enables discretionary prosecution (even though the Finnish system generally follows a principle of mandatory prosecution) and makes it possible to procedurally redress the broad applicability of Finnish criminal law in individual cases and take possible conflicts of jurisdiction into account.<sup>81</sup> Among all the offences that in principle fall under Finnish criminal jurisdiction, charges should only be brought for offences that have a sufficiently close relation to Finnish interests or if prosecution in Finland is otherwise considered appropriate.<sup>82</sup> The aim should always be to allocate the proceedings to the State that offers the best conditions for a fair and effective trial.

However, Finnish legislation does not contain any specifically prescribed criteria that should be taken into consideration when deciding on whether or not to initiate investigations in Finland for extraterritorial offences. Criteria to be taken into consideration should at least include the severity of the offence and its connection to Finland, location of evidence as well as other State's possibilities of providing a fair and effective trial and interests of both the defendant and the victim.<sup>83</sup> Also, the framework decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings is implemented in Finland through a separate Act, which obliges the Finnish authorities to strive for a solution in cases of conflicting claims of jurisdiction.

Exceptions to the main rule in Ch. 1, sec. 12 CC concern *inter alia* situations where an offence has been committed abroad by a Finnish national and has been directed at Finland or another Finnish national and situations where an offence has been committed aboard a Finnish vessel while on the high seas or in territory not belonging to any State. The Nordic prosecutors have a long history of cooperation among each other, so a prosecution order is also not required when the offence has been committed in another Nordic country and competent prosecutor of the place of commission has requested that the offence be tried in a Finnish court.

#### 4 Conclusion

The so-called '*Ruggie principles*' have been taken notice of by the Finnish government. In 2014, the ministry of economic affairs and employment published an execution plan for the implementation of the UN Guiding Principles on Business and Human Rights.<sup>84</sup> The aim of

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<sup>80</sup> *ibid.*

<sup>81</sup> Helenius (n 18) 120–121.

<sup>82</sup> Träskman (n 57) 342.

<sup>83</sup> Helenius (n 18) 367 ff.

<sup>84</sup> Työ- ja elinkeinoministeriön julkaisu 44/2014 (Publicaiton by the Ministry of Economic Affairs and Employment), YK:n yrityksiä ja ihmisoikeuksia koskevien ohjaavien periaatteiden kansallinen toimeenpanosuunnitelma (National execution plan for the UN Guiding Principles on Business and Human Rights).

the execution plan was to initiate measures that will gain more attention to the relationship between business and human rights and thereby help corporations to pay better attention to the human rights effects of their operations.

As part of the national implementation of these principles, a report was also published by the Ministry of Economic Affairs and Employment in 2015, called 'Finland's legislation, international business and human rights'. The aim of the report was to examine how well the current Finnish legislation is applicable to human rights violations by Finnish companies abroad and possible legal gaps and problems that should be amended. The essential result was that the current legislation hardly offers effective possibilities for holding Finnish corporations accountable for human rights violations committed in their operations abroad.

One central result of the report was also that the responsibility of Finnish companies for violations committed in the operations of their subsidiaries and subcontractors or suppliers abroad is unclear. The report *inter alia* suggested that it should be analysed, whether Finnish companies can be obliged to make sure that they do not make use of subcontractors that have been known to violate human rights.<sup>85</sup>

Accordingly, the 'Ruggie principles' have been acknowledged in Finland and steps have been taken in order to align the Finnish legislation more with them.

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<sup>85</sup> Työ- ja elinkeinoministeriön julkaisu 14/2015 (Publication by the Ministry of Economic Affairs and Employment), Suomen lainsäädäntö, kansainvälinen liiketoiminta ja ihmisoikeudet (Finland's legislation, international business and human rights) 47–49.

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# FRENCH REPORT ON PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW

*By Juliette Lelieur \**

## 1 Introduction

At first glance French criminal Law seems to be favourable to the prosecution of companies for international human rights violations. The French Penal Code provides for the criminal liability of legal persons, and this liability covers almost all criminal offences. In addition, French criminal courts easily have jurisdiction on transnational crimes. Jurisdiction based on territoriality is very wide as it extends to cross-border crimes mostly committed abroad and presenting only a tenuous connection to France, and additionally legislation encompasses several principles of extraterritorial jurisdiction, including active and passive personality as well as universality.

However, in practice few companies are prosecuted for violations of international human rights in France. On one side, offences committed by companies while doing business seldom turn out, fortunately, to be core crimes (as defined in the Rome Statute of the International Criminal Court) or serious treaty crimes, which are the scope of this comparative analysis. For instance, insisting on employees to keep working at a factory in an area affected by armed conflicts does not constitute a core crime. Nor is it covered by any treaty. It is however a misdemeanour under French Law, which incriminates the risks caused to another person's life (section 223-1 of the Penal Code). Moreover, if any employee dies or is injured, involuntary manslaughter or injury might come into consideration against the company, but it is neither a core nor a treaty crime. Though, the limited scope of this report clearly does not exhaust the reasons why prosecution of companies for international human rights violations committed abroad are rare in France.

A preliminary assessment is that multinational enterprises or groups are not criminally liable, because they are not recognized as legal entities. Criminal corporate liability only binds incorporated structures, which in practice are simple members of the global group. Another lack of the domestic legislation is the absence of a legal framework of jurisdictional rules specifically applying to legal persons. Concerning the existing legislation, several technical obstacles often bar prosecution or punishment of companies. Firstly, corporations' criminal accountability in the French legal system, conceived as a vicarious liability of the corporation only for offences committed at its top level (by the CEO, the Chairperson, the board of directors or very senior level officials), is too narrow. This finding does not

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specifically concern transnational crime but it has a significant impact on it. Second, international jurisdiction based on the active personality principle does not operate in practice, since legal procedural requirements such as the denunciation of the offence by the authorities of the State where it was committed are generally not met. Third, even if this has not received any concrete illustration for now, the double criminality requirement may be an obstacle to the prosecution of French companies operating abroad, especially as it is not clear whether French criminal courts can punish a company if the law of the country where the crime took place does not provide for the criminal liability of legal persons. Finally, universal jurisdiction is not applicable to corporations. This report will examine those difficulties into detail and conclude with reform's proposals.

## **2 General Framework for Prosecuting Corporations for Violations of International Criminal Law**

### **2.1 Legal Rules governing the prosecution of corporations**

The criminal liability of legal persons was introduced into French law when the New Penal Code was adopted in 1992. It came into force in 1994. The aim of the new legislation was to shield CEOs from liability for offences committed by someone else in the firm, which was considered contrary to the principle of personal liability and too harsh for CEOs, who generally did not act in their own interests but for the company's benefit. The legal person was thought to be the proper person to bear criminal liability if an action taken on its behalf proved to be a criminal offence. This was especially true as more and more corporations were involved in business after the industrial revolution and the amount of accidents causing death or injury at work had significantly increased. For procedural reasons, holding the legal person criminally responsible for involuntary manslaughter or injury made it easier to compensate victims. Furthermore, the corporation was more likely to be solvent than a natural person.

The purpose of punishing corporations for intentional offences and serious crimes is not indicated as a main rationale of the legislation but the lawmaker found it fair to punish powerful and wealthy corporations for damages they caused to the environment or the economy and for breaches of public health, social and labor legislation. That included criminal punishment.

#### *2.1.1 Substantive Criminal Law establishing criminal liability*

Section 121-2 of the Penal Code (PC) sets out the criminal liability of legal persons. It reads:

'Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in sections 121-4 to 121-7.<sup>1</sup>

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<sup>1</sup> The reference to sections 121-4 to 121-7 implies that legal persons can be held responsible for attempt or complicity of a crime, just as natural person do.

However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions.

The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of section 121-3'.<sup>2</sup>

#### *Corporations concerned*

According to section 121-2 paragraph 1, any legal person may be held criminally liable. This includes legal persons governed by public law – as for example a city or a region<sup>3</sup> – and each organisation being a legal entity according to private law. This is valid for non-profit organisations (e.g. the popular French '*association selon la loi de 1901*', political parties, unions, foundations, religious congregations, etc.), as well as for corporations. All types of civil or commercial law corporations are concerned. The most frequent examples of corporations prosecuted for criminal offences are the SA (*société anonyme*) and the SARL (*société à responsabilité limitée*). Other corporations such as the SAS (*société par actions simplifiées*), the GIE and GEIE (*groupement – européen – d'intérêt économique*) may also be liable for their criminal acts, as well as the EURL (*entreprise unipersonnelle à responsabilité limitée*).

However, non-incorporated groups such as a global group (*groupe de sociétés*) and a joint-venture company (*société en participation*) escape liability from a criminal perspective. As a consequence, if a practice or behavior ordered or authorized by managers or leaders of a global group – especially with the objective of increasing the global income of the group – appears to be a criminal offence, only the corporations being members of the group can be prosecuted and held liable for it. They might be considered as co-authors or accomplices of each other in certain situations.<sup>4</sup> This is not a satisfying solution as these corporations do not necessarily have sufficient autonomy to follow their own decisions and refuse to take 'criminal risk' against the leaders of the group. Moreover it makes it very complicated for the national enforcement authorities to prosecute several companies, mostly established in different jurisdictions. A significant part of the scholarship complains of the difficulties arising from the lack of legal personhood of some multinational corporations.<sup>5</sup>

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<sup>2</sup> Section 121-3 provides for the requirements of *mens rea* in French criminal law. The fourth paragraph of this section was introduced by the Law No 2000-647 of 10 July 2000 relative to involuntary offences. It tends to limit the criminal liability of natural persons in case of indirect causality. To this purpose, it elevates the requirements for *mens rea* when a natural person – for example the chief manager of a company – did not directly contribute to causing the damage but, instead, created or contributed to create the situation which allowed the damage to happen, or failed to take steps enabling it to be avoided'.

<sup>3</sup> The French government, however, is excluded because it cannot prosecute and punish itself. Foreign States are obviously not concerned. Section 121-2 paragraph 2 provides with some restrictions applicable to the liability of legal persons of public law that will not be discussed in this report.

<sup>4</sup> Alain Coeuret, 'Responsabilité pénale des personnes morales et groupe de sociétés' (2013) *La semaine juridique*, Ed. Sociale, I, 1369.

<sup>5</sup> Cristina Mauro, 'Application dans l'espace de la loi pénale et entreprises multinationales' (2012) *AJ Pénal* 12-15; Emmanuel Daoud et Annaëlle André, 'La responsabilité pénale des entreprises transnationales françaises : fiction ou réalité juridique ?' (2012) *AJ Pénal* 15-20.

They argue for a legal evolution taking the legal person's reality theory into consideration.<sup>6</sup> The reality theory opposes the reasoning according to which the legal person is a fiction that only the law can establish. According to it, civil courts consider criteria such as the existence of a collective expression and of common legitimate interests that deserve judicial protection, in order to attribute legal personality to different kinds of entities even in the absence of a legal provision in that sense. As a consequence, these entities are allowed to go to court.<sup>7</sup> Criminal courts cannot adopt the reality theory on their own initiative, because this would lead to an extension of criminalization contrary to the legality principle. It is therefore for the Lawmakers to generate a new approach.

Foreign corporations may be held criminally liable under French criminal law if French courts have jurisdiction (e.g. crime committed in France or against a French victim).<sup>8</sup> In March 2017, for instance, not only the French subsidiary of the Swiss bank UBS but also the parent company USB AG were formally accused by French investigative judges in a large tax fraud case. They will both have to face French criminal courts.<sup>9</sup> Theoretically, it may still be debated whether the existence of a legal personality, which is a question of civil Law, must be appreciated according to the national Law of the entity or according to French Law?<sup>10</sup> In practice, corporations are legal persons according to both legal systems so that the difficulty can easily be overridden by courts.

Several questions have appeared as to corporations being in the process of constituting themselves as well as to corporations disappearing, either because they are absorbed by others or they divide themselves or they merge with another corporation in order to build a new legal entity. As a general rule, it is clear that only a full standing corporation is a legal entity. Its constitution requires a range of formalities, the achievement of which is necessary to give birth to the legal personality and make it criminally liable. Obviously, if the criminal conduct has been planned before the constitution but is executed or goes on after it, the legal entity is accountable. Going further, a part of the scholarship argues that offences committed by the founders of a company before the achievement of the constitution formalities is to be imputed to the new corporation after it has taken over the pre-incorporation acts and commitments of its founders.<sup>11</sup> Absorbed companies cannot be held liable exactly as dead natural persons are no subjects of criminal law anymore. According to the criminal law

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<sup>6</sup> Jean-Yves Maréchal, 'Art. 121-2' *JurisClasseur Pénal* n° 47-50; Bertrand De Lamy, Marc Segonds, 'Responsabilité pénale des personnes morales' *JurisClasseur Pénal des affaires* n° 24; Marc Segonds, 'Frauder l'article 121-2 du Code pénal' (2009) *Droit pénal*, étude n° 18, n° 14.

<sup>7</sup> Cass. 2<sup>e</sup> civ, 28 janv 1954, *Dalloz* 1954, jur., p. 217, note Georges Lévassieur.

<sup>8</sup> Cass. crim. 24 septembre 2014, pourvoi n° 14-82684, *Bull. crim.* n° 199.

<sup>9</sup> The parent company was charged with illegal selling and money laundering of assets generated by tax fraud, while its French branch was accused of complicity of these crimes.

<sup>10</sup> In favour of the application of the national law of the legal person, Mireille Delmas-Marty, 'Personnes morales étrangères et françaises' (1993) *Revue des Sociétés* 255-260; Michèle-Laure Rassat, *Droit pénal général* (Paris, Ellipses 3rd edn. 2014) n° 471. In favour of the application of French Law, Frédéric Desportes et Francis Le Gunehec, *Droit pénal général* (Paris, Economica 16th edn 2009) n° 587.

<sup>11</sup> Jean-Christophe Saint-Pau, 'La responsabilité des personnes morales, réalité et fiction' in Philippe Conte, Chantal Giraud-van Gaver, Jacques-Henri Robert, Jean-Christophe Saint-Pau (eds), *Le risque pénal dans l'entreprise* (Paris, Litec, coll. Carré droit, 2003) 71-113, n° 120.

principle of personal liability, absorbing companies cannot be held responsible for offences committed by the absorbed, unless they have benefitted from the proceeds of the crime and they are prosecuted and punished under the qualification of concealment. The same is true for companies resulting from the merging of others. Thus, criminal French Law does not follow the case-law of the ECJ, setting – in the context of *administrative* sanctions – that the merger by acquisition ‘results in the transfer to the acquiring company of the obligation to pay a fine imposed by final decision adopted after the merger by acquisition for infringements committed by the acquired company prior to that merger’ (CJUE, 5 mars 2015, aff. C-343/13).<sup>12</sup>

### *Offences concerned*

In 1992, according to the so-called speciality principle (*principe de spécialité*), the law provided for a limited scope of offences that may trigger the criminal liability of a legal person. Although a lot of offences defined in the Penal Code and many others defined elsewhere fell within that scope, the most serious crimes, like murder, poisoning and rape, were excluded. It was argued that a legal person could not have the commission of such crimes as a corporate purpose. This type of crimes could therefore not be committed on its behalf.

Yet after a few years, these crimes were added into legislation<sup>13</sup> and eventually, in 2004,<sup>14</sup> the lawmakers abandoned the speciality principle and opted for an unlimited scope of application.<sup>15</sup> The only exceptions concern press offences as well as offences committed through audio-visual communication.<sup>16</sup> Consequently, almost all criminal offences trigger the liability of companies today, including those provided for in other legislation than in the Penal Code (Environment Code, Consumer Protection Code, Labour Code, Commercial Code, Road Code, etc.). In practice, offences to the road code and transport legislation, fraud and breach of trust, business and financial crimes, breaches of labour and environmental legislation as well as health and security laws, involuntary manslaughter and involuntary injury are the most frequently concerned offences.

The suppression of the speciality principle has been interpreted by scholars as the confirmation that the French liability of legal person is indirect (or vicarious).<sup>17</sup> The corporation is not punished for its own offence – as for example it is obvious that a company cannot rape a natural person – but only for the offences that have been committed by (natural) persons on its behalf. In other words, the suppression of the speciality principle in 2004 reaffirms the main doctrinal thesis that criminal liability of legal persons is based on the attribution of individual fault to the corporation. It is not a direct corporate blame.

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<sup>12</sup> Cass. crim. 25 octobre 2016, pourvoi n° 16-80366, publié au bulletin.

<sup>13</sup> Law No 2001-504 of 12 June 2001.

<sup>14</sup> Section 54 of Law No 2004-204 of 9 March 2004.

<sup>15</sup> Marie-Elisabeth Cartier, ‘De la suppression du principe de spécialité de la responsabilité pénale des personnes morales. Libres propos’, in *Mélanges Bouloc* (Daloz 2007) 97-126.

<sup>16</sup> For these offences, a cumulative liability of the author and of the publisher or diffuser (as natural persons) already applies. Therefore, an additional liability carried by a legal person was considered unnecessary.

<sup>17</sup> Roger Bernardini, ‘Personne morale’ (octobre 2010) Répertoire Pénal Daloz, n° 48 ; Jean-Yves Maréchal, ‘Art. 121-2’, *JurisClasseur Pénal*, n° 59.

### *Commission of the offence by corporate bodies or representatives*

According to section 121-2 paragraph 1, legal persons are liable 'for the offences committed on their behalf by their corporate bodies or their representatives'. As a consequence of this phrasing, it is generally considered in France that a company cannot, itself, commit an offence.<sup>18</sup> Its disorganisation or bad corporate culture is not evaluated from a criminal law perspective. There must be an intermediary, a corporate body or a representative, that committed the offence on behalf of the corporation. In other words, the liability of the legal person is not autonomous, but vicarious. It relies on the intermediaries mentioned by the law, bodies or representatives. Section 121-2 paragraph 1 does not require that these intermediaries be natural persons. If a company has another company as a corporate body (for instance, a company is chaired by another company), criminal responsibility is not excluded. Courts will have to examine if the company being the corporate body has committed an offence, thus if its own organs or representatives have done so.

Depending on the type of companies, corporate bodies are the chairman, the board of directors, the CEO, etc. In practice, however, it is rare that a corporate body will commit a crime, even by omission. There are few cases of criminal liability of companies based on this legal element, or they concern small legal entities (e.g. family corporations, where the corporate bodies are natural persons).

Case-law offers many more examples of crimes committed by company employees or agents, who may be considered as representatives. As a result, criminal courts usually analyse the elements of crime vis-à-vis natural persons operating on behalf of the company. Yet at the same time, the courts have adopted a very narrow interpretation of the legal term 'representatives'. They require an official delegation of authority to a natural person for such person to be deemed a representative – although there has been some inconsistency in the case-law. Such delegations are generally given to the very top managers of a company. In a multinational group, for example, most of the time only the head of the security department for the whole group, who is operating from the headquarter of the parent company of the group, holds a delegation of authority. Therefore, it often happens in the case-law that the persons implicated in the commission of the offence are found not sufficiently senior to bind the corporation (e.g. in the 2015 foreign bribery case, *Safran*).<sup>19</sup> The courts have, however, held in the context of small entities that a corporation incurs liability for the actions of a *de facto* management if its *de jure* management (the official corporate body) was aware of the situation and accepted it.<sup>20</sup> To that purpose the *de facto* management was seen as a representative.

Furthermore, a parent company cannot be held liable for the acts of its subsidiary because the subsidiary is not considered as a representative. This leads to a serious lack affecting

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<sup>18</sup> *Contra* Emmanuel Dreyer, *La semaine juridique* (Ed. Générale, 2006) II, 10199 ; Jean-Christophe Saint-Pau (n 11).

<sup>19</sup> Cour d'appel de Paris, 7 January 2015, 13<sup>e</sup> chambre correctionnelle, n° 12/08695, obs. Solène Clément, *AJ Pénal* (2017) 252-253.

<sup>20</sup> Cass. Crim. 17 December 2003, n° 00-87.872; Cass. Crim. 13 April 2010, n° 09-86.429; Cass. Crim. 16 October 2013, n° 12-81.532.

enforcement of criminal law when the subsidiary operates abroad, as, for reasons linked to jurisdiction, it is mostly impossible for French courts to prosecute the subsidiary and there are not legal means to make the parent company overtake accountability. Instead, the economic and structural control of the subsidiary by the parent company should make consider that the action of the organs or representative of the subsidiary legally bind the parent company.<sup>21</sup>

As criminal liability is made up of two elements, *actus reus and mens rea*, French courts generally require evidence that the intermediaries acted or failed to act in a prohibited way. They also require evidence of a guilty mind, criminal intent, or recklessness vis-à-vis these intermediaries. In an important judgment of 2001 the Court of cassation stated that the body's or representative's fault is sufficient to trigger the criminal liability of the corporation in case the offence has been committed on the legal person's behalf. It is not necessary to characterize a separate fault of the corporation.<sup>22</sup>

From 2006 to 2011, an evolution has taken place concerning the need to prove the offence being committed by the intermediaries in order to attribute it to legal person.<sup>23</sup> Several courts considered the conduct of the corporation instead of that of the intermediaries, and convictions were directly based on corporation's behavior. In that context, they found it unnecessary to identify the natural persons who physically committed the offence, as long as they were satisfied that the wrongdoing must have emanated from a corporate body or a representative. They did so for involuntary homicide or injuries, considering for instance that negligence in implementing mandatory security measures for the protection of workers ending up in the criminal offence, had to be attributed to the corporation even if it was not possible establish who concretely failed to implement them, and were approved by the Court of cassation.<sup>24</sup> Even for voluntary offences, the Court of cassation upheld a conviction directly based on the corporate fault in a case where the offences were found to be part of the commercial policy of the firm, so that, according to the judges, they must have been committed by their bodies or representatives.<sup>25</sup> However, this evolution declined from 2011<sup>26</sup>

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<sup>21</sup> Cristina Mauro (n 5) 13.

<sup>22</sup> Cass. Crim. 26 June 2001, n° 00-83466, Bull. Crim. n° 161 (commentaries: Gabriel Roujou de Boubée, Recueil Dalloz (2002) 1801; Daniel Ohl, La semaine juridique, Ed. Entreprise (2002) 371).

<sup>23</sup> Charles-Henri Boeringer et Arthur Millerand, 'La responsabilité pénale des personnes morales : une casuistique diverse au sein d'une jurisprudence cohérente' (2014) Droit pénal n° 3, étude 5 ; Juliette Tricot, 'Le droit pénal à l'épreuve de la responsabilité des personnes morales : l'exemple français' (2012) Revue de Science criminelle 19.

<sup>24</sup> Cass. crim. 20 June 2006, n° 05-85.255, Bull. Crim. n° 188 (commentaries J.-C. Saint-Pau, Recueil Dalloz 2007, p. 617 ; Emmanuel Dreyer, La semaine juridique, Ed. Générale, 2006, II, 10199 ; Corine Mascala, Recueil Dalloz 2007, p. 1624 ; Bernard Bouloc, Revue des sociétés 2006, p. 895).

<sup>25</sup> Cass. crim. 25 June 2008, n° 07-80.261, Bull. crim. n° 167 (commentaries: Haritini Matsopoulou, Revue des sociétés (2008) 873 ; Marie-Christine Sordino, La semaine juridique, Ed. Entreprise (2009) 1308).

<sup>26</sup> Cass. crim. 11 October 2011, n° 10-87.212, Bull. crim. n° 202 (commentaries: Jacques-Henri Robert, La semaine juridique, Edition Générale (2011) 1385; X. Delassault et A.-L. Dodet, La semaine juridique, Edition Entreprise (2012) 1254; Yves Mayaud, Revue de science criminelle (2011) 825; Bernard Bouloc, AJ pénal (2012) 35-37 ; Haritini Matsopoulou, Revue des sociétés (2012) 52; Jean-Yves Chevallier, Revue pénitentiaire et de droit pénal (2012) 147).

and was stopped in 2012, where the Court of cassation returned more or less to the traditional vicarious liability system.<sup>27</sup> Especially in cases where organs had delegated their responsibility to employees, the Court reaffirmed the necessity to establish who committed the offence in order to attribute it to the corporation. It was encouraged in that sense by the biggest part of the scholarship. Most authors wished a literal interpretation of the terms of section 121-2, and, generally speaking, French lawyers were not in favour of a significant increase of the legal person's accountability.<sup>28</sup>

The legal requirement that the offence be committed *by the corporate bodies or the representatives*, added to the narrow judicial interpretation of the term 'representatives', dramatically limits legal person's accountability. It clearly is the Achilles' heel of the French legal system. The author of this report agrees with Jean-Yves Maréchal that the legislator should simply remove it from section 121-2 in order to enable autonomous criminal responsibility to emerge.<sup>29</sup> Based on the reality theory, this new framework of corporation's criminal liability would rest on the acknowledgement that a bad company culture or a structural disorganisation or a wrong company policy may constitute a fault in criminal sense.

#### *Commission of the offence on behalf of the legal person*

There is not much discussion of the legal requirement that the offence be committed on behalf of the legal person, including by the courts. It is generally considered that the requirement is met as long as the body or representative was not acting in its or their personal interest, but in the interest of the corporation. For example, if a legal person's representative misuses their delegated authority for personal enrichment, or deliberately acts outside the scope of the legal person's activity, its conduct cannot be attributed to the legal person. Apart from in a few extreme cases, the courts have held that acts that fall within the scope of the corporation's activity, even if there is no particular benefit for the legal person, are committed on the behalf of the legal person.

#### *Penalties*

The main penalty applicable to legal persons is a fine. According to Section 131-38 PC, a legal person may be fined up to five times the amount of the fine provided by the law for a natural person. For example, involuntary manslaughter with no aggravating factors is punished by a maximum fine of 45.000 Euros. A legal person therefore would incur a fine of up to 225.000

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<sup>27</sup> Cass. crim., 11 avr. 2012, n° 10-86.974, Bull. crim. n° 94 (commentaries: J.-H. Robert, *La semaine juridique*, Edition Générale (2012) 740; Jean-Christophe Saint-Pau, *Recueil Dalloz* (2012) 1381; Emmanuel Dreyer, *Gazette du Palais* (27 July 2012) 19; Marc Segonds, *Droit pénal* (2012) chron. 9, n° 2; Yves Mayaud, *Revue de science criminelle* (2012) 375; Bertrand de Lamy, *Revue pénitentiaire* (2012) 405).

<sup>28</sup> Bernard Bouloc (n 25), Bertrand de Lamy (n 26), Hartini Matsopoulou (n 24 and n 25). Jacques-Henri Robert et Marc Segonds (n 26).

<sup>29</sup> Jean-Yves Maréchal, 'L'exigence variable de l'identification de la personne physique' in M. Daury-Fauveau et M. Benillouche (eds), *Dépénalisation de la vie des affaires et responsabilité pénale des personnes morales*, (PUF, 2009) 49-60. See also Cristina Mauro (n 5), 13.

Euros. If a legal person commits a crime, such as murder or assassination, punished solely by a custodial sentence, the maximum fine is 1 million Euros.

Several so-called complementary penalties may be imposed on legal persons as well. Section 131-39 PC indicates a wide range of such penalties, including dissolution, prohibition to exercise a social or professional activity, placement under judicial supervision, closure of the company's establishment that was used to commit the offence, disqualification from public tenders, prohibition to make a public appeal for funds, confiscation of the instruments or proceeds of the crime, and even posting a public notice of the judgment of conviction or publishing it in the press. These penalties are generally more dissuasive for companies than fines are. However they are not generally applicable to all offences. The Penal Code determines offence by offence which complementary penalty is applicable to legal persons. Several complementary penalties may be afflicted in addition to the fine.

### *Criminal liability of natural persons involved in the crime*

The fact that a legal person is held criminally responsible for an offence does not prevent the natural person who committed it from also being held criminally liable for the same offence (section 121-2 paragraph 3 PC). The rationale for this is to keep the pressure of criminal law on individuals and dissuade them to act against the Law. They cannot escape criminal liability just because they acted on behalf of a legal person bearing criminal responsibility. In practice, it often happens that the legal and the natural person are prosecuted and punished both.

#### *2.1.2 Procedural Law governing criminal prosecution*

General rules of criminal procedural Law apply to legal persons the same way they do for natural persons. According to Section 2 of the Code of Penal Procedure (CPP), the victim of a crime can launch criminal proceedings against a legal person just against a natural one, taking the position of the civil party to the criminal trial. This is also valid for NGOs, insofar as they have legal capacity to go to court and their field of activities falls into the scope of the protected interests listed by the Law (Section 2-1 to 2-23 CPP).

The most active NGOs for the defense of victims of human rights violations committed by business actors are the FIDH (*Fédération Internationale des Droits de l'Homme*)<sup>30</sup>, LDH (*Ligue des droits de l'Homme*)<sup>31</sup> and Sherpa.<sup>32</sup> They have launched several criminal proceedings against French companies providing weapons or intelligence systems to groups in war situations or to dictatorships using torture, or against a bank providing funding for those weapons, as well as to French multinational companies provoking serious harm while achieving commercial purposes abroad.<sup>33</sup> However, NGO's are in turn targets of so-called 'gag proceedings' (*procédures bâillons*) engaged by companies against them in order to

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<sup>30</sup> <<https://www.fidh.org/fr/>>. Antoine Bernard et Elin Wrzoncki, 'La responsabilité pénale des transnationales. L'action de la FIDH' (2012) AJ Pénal, 20.

<sup>31</sup> <<https://www.ldh-france.org/missions-de-la-ldh/>>.

<sup>32</sup> <<https://www.asso-sherpa.org/home>>.

<sup>33</sup> See below, under 2.3.

intimidate and dissuade them to express their view and carry on their judicial activity.<sup>34</sup> Investigative journalist, whistle-blowers and even scholars<sup>35</sup> are victims of ‘gag proceedings’ too. For that reason alone, it would be most desirable that public prosecutors take initiative about human rights violations committed by French companies abroad.

Moreover, special rules governing the prosecution of legal persons are laid down in section 706-41 to 706-46 CPP. They provide that the natural person who is the legal person’s representative at the time of the proceedings has to represent it before judicial authorities at all stages of the criminal proceedings (section 706-43 CPP). As it may happen that the legal representative is simultaneously being prosecuted as a natural person in the same proceedings, possibly for the same offence, the law provides that a court officer may be designated by the president of the court to represent the legal person. Any person granted a power of attorney for this purpose may also be appointed.<sup>36</sup>

The Code of Penal Procedure does not specifically address the question whether a corporation can be tried *in absentia*. However, French Law allows it for individuals (Sections 487 and 379-2 CPP) and there is no reason why the same should not be true for legal persons, even in cross-border cases, all the more so as the president of the court can designate the court officer to represent it.

Judicial supervision may be ordered against a legal person after it has been accused of a criminal offence by an investigating judge. The legal person may be required to pay a bond (1.1 billion Euros in the tax fraud case of *UBS*, which is the most spectacular example)<sup>37</sup> and be prohibited from conducting certain professional or social activities. Moreover, a court officer may be designated to supervise the legal person (section 706-45 CPP).

## 2.2 International Criminal Law framework

France is a State party to several international conventions providing for criminal offences for the purpose of protecting human rights. Concerning ‘core crimes’, it has signed and

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<sup>34</sup> Sandra Cossart, ‘Il faut faire cesser les « poursuites bâillons »’, (2017) Petites Affiches, n° 189-190, 4. For instance, the multinational company Vinci Construction that is subject to prosecutions for forced labor concerning buildings for the 2022 World Cup in Qatar ([www.theguardian.com/world/2015/apr/26/france-vinci-construction-qatar-forced-labour-claims-2022-world-cup](http://www.theguardian.com/world/2015/apr/26/france-vinci-construction-qatar-forced-labour-claims-2022-world-cup)) filed a complaint for defamation against the NGO Sherpa ([www.lepoint.fr/justice/accusations-de-travail-force-au-qatar-vinci-deboute-par-le-tribunal-13-04-2016-2032047\\_2386.php](http://www.lepoint.fr/justice/accusations-de-travail-force-au-qatar-vinci-deboute-par-le-tribunal-13-04-2016-2032047_2386.php)).

<sup>35</sup> Prof. Laurent Neyret, specialist of environmental criminal Law, was subject to criminal proceedings for defamation launched by the company Chimirec, on the basis of the commentary he wrote about a judgment concerning Chimirec. In his commentary, he expressed among other things the view that the sanctions pronounced against Chimirec in a pollution case were too low (<[www.franceculture.fr/droit-justice/procedures-baillons-les-chercheurs-vises-par-lintimidation-judiciaire#xtor=EPR-2-](http://www.franceculture.fr/droit-justice/procedures-baillons-les-chercheurs-vises-par-lintimidation-judiciaire#xtor=EPR-2-)>; <[www.lemonde.fr/police-justice/article/2017/10/03/procedures-baillons-la-cour-d-appel-de-paris-au-soutien-de-la-liberte-d-expression-des-chercheurs\\_5195406\\_1653578.html](http://www.lemonde.fr/police-justice/article/2017/10/03/procedures-baillons-la-cour-d-appel-de-paris-au-soutien-de-la-liberte-d-expression-des-chercheurs_5195406_1653578.html)>)

<sup>36</sup> Mikaël Benillouche, ‘La poursuite des personnes morales’ in M. Dauray-Fauveau et M. Benillouche (eds), *Dépénalisation de la vie des affaires et responsabilité pénale des personnes morales* (PUF, coll. CEPRISCA, 2009) 17-35.

<sup>37</sup> The bond was challenged by UBS before domestic courts and the European Court of Human Rights, *UBS AG v France*, Judgment of 29 November 2016, application no. 29778/15.

ratified the UN Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the Rome Statute of the International Criminal Court of 1998. The crimes defined in these conventions are recognized in the Penal Code (section 211-1 to 212-3).

Moreover, the French legal system includes many so-called 'treaty crimes' that may lead to serious violations of human rights when there are (repeatedly) committed by business actors operating abroad, especially in developing countries. France has duly implemented the cross-border bribery offences derived from the OECD, European Council and United-Nations Conventions tackling against corruption into domestic law (section 435-1 to 435-15 PC). The laundering of money arising from serious crimes is criminalized too (section 324-1 to 324-9 PC). The financing of war crimes and other serious crimes falls into complicity of the commission of those crimes (section 121-7 PC), whereas the financing of terrorist acts impacting on human rights is covered by the provisions of the Penal Code especially dealing with the financing of terrorism (section 421-2-2 PC). Finally, trafficking in drugs and in persons, as well as terrorism are duly incriminated offences in domestic Law. There is no legal obstacle to prosecute and punish companies for the commission of the above-mentioned core and treaty crimes.

### 2.3 Prominent cases, media coverage

Several cases relating to allegations of serious violations by French companies are currently running in France. They have in common to be all initiated by NGO's exercising the rights of the civil party according to section 2-1 to 2-23 CPP. There is no example of a case launched by a prosecutor. Moreover, none of these cases have come to a final decision for now. This report will describe a selection of cases.

A first example concerns criminal proceedings launched by several human rights and environmental NGOs against the multinational timber company DLH, which is alleged to have bought illegally obtained timber during the Liberian civil war. The sale of the timber is deemed to have enabled President Charles Taylor to procure arms in breach of UN sanctions and to wage a campaign of violence where 250.000 people were killed and almost 1 million displaced.<sup>38</sup> The complaint filed in 2009 by NGOs includes suspicions of corruption, tax evasion, environmental degradation and UN arms embargo violations. The prosecutor then opened a preliminary investigation in 2010. In March 2014, after the prosecutor dismissed the case, the complainants brought the action to the investigative judge. The proceedings haven't come to an end, and will probably never do so because in 2016 the parent company decided to close down DLH France, which was one of the main defendants.

Further cases concern the supplying of weapons or sophisticated surveillance technology by French companies to dictatorships. One example is the *Amesys case*,<sup>39</sup> where the company is alleged to have provided the Gaddafi regime, known for serious violations of human rights against Libyan citizens since at least 2007, with a communication surveillance system that

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<sup>38</sup> For further information, see The Corporate Crime Principles, October 2016, 23-25 (<[www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf](http://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf)>).

<sup>39</sup> <[https://www.fidh.org/IMG/pdf/report\\_amesys\\_case\\_eng.pdf](https://www.fidh.org/IMG/pdf/report_amesys_case_eng.pdf)>.

most probably facilitated the targeting, arrest and oppression of people participating to uprising movements during the Arab Spring in 2011. A complaint for complicity of torture and other cruel, inhuman or degrading treatments was filed against Amesys in 2011 by the NGOs FIDH and LDH, which declared themselves civil parties in the proceedings to the investigative judge. In 2012, the prosecutor issued an order not to open a criminal investigation, but the investigative judge of the Specialized War Crimes Unit decided on the contrary to open an investigation. This decision was challenged by the prosecutor and a few months later, the Court of appeal issued an order to replace the investigative judge. In 2013, five Libyan victims became a civil party to the proceedings and were heard by the new appointed investigative judges, who ordered psychological evaluations on the victims. Since then, no further decisive decision was taken by criminal authorities. In 2017, the FIDH and LDH alerted the public opinion that the surveillance system was sold to Egypt.<sup>40</sup>

A different combination can be observed in the *BNP Paribas – Rwanda case*, where the French bank is being prosecuted since 2017 for complicity of genocide, crimes against humanity and war crimes on a complaint filed by Sherpa and other NGOs and groups of victims. The accusation is based on a bank transfer of 1.14 million Euros executed by BNP Paribas for its client, the National Bank of Rwanda, towards a Dutch intermediary in sales of arms in June 1994 – after the UN arm embargo was declared. The payment is supposed to be related to 80 tons of arms that were used during the genocide. Investigations have started recently and will be run by an investigative judge.<sup>41</sup>

Last but not least, the *Lafarge* case has received the biggest press coverage, because one of the charges is related to IS terrorism, which French public opinion is very aware of since the numerous attacks the country has endured since 2015.

A cement plant situated in northeastern Syria was acquired by the French company Lafarge SA in 2007. After the plant was renovated, operations started in 2010. The investment is evaluated at 600 million Euros. In 2011, the civil war started. Whereas many foreign companies decided to leave Syria, Lafarge's management chose to maintain the activity despite the significant deterioration in the security situation. By the middle of 2012, senior expatriate employees were evacuated from Syria and relocated to Cairo, where they oversaw the plant's operation remotely. The plant became increasingly subject to disruption by local armed groups, who interfered with employee transportation to and from the plant and restricted access to necessary supplies. Starting in 2013, Lafarge used intermediaries to negotiate arrangements with these groups. The company made payments to the intermediaries in order to secure its supply chain and the free movement of its employees. According to *Le Monde's* investigation, the payments were made to the Islamic State, which had moved into the area by 2013. These payments continued until 19<sup>th</sup> September 2014, when the Islamic State eventually took possession of the plant and *Lafarge* had to cease its activity.

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<sup>40</sup> <<https://www.fidh.org/en/region/north-africa-middle-east/egypt/sale-of-surveillance-equipment-to-egypt-by-french-company-amesys>>.

<sup>41</sup> <<https://www.enca.com/africa/french-bank-probed-for-alleged-complicity-in-rwandan-genocide>>.

In 2015, the Swiss Group Holcim bought 100% of the shares of Lafarge SA. The corporation Lafarge SA did not disappear through this operation and remains criminally liable for offences committed before then. However, the name of the company has changed to LafargeHolcim.

After *Le Monde* revealed the facts in early 2016, announcing that Lafarge had been ‘financing IS terrorism’ in Syria, two criminal complaints were filed. The first was lodged by the Ministry of Economy and points to a breach of Section 459 of the Customs Code. Lafarge is alleged to have transferred money to persons or groups who are the targets of European economic sanctions. The second complaint was filed by two NGOs: Sherpa, and the European Centre for Constitutional and Human Rights (ECCHR). Eleven former employees of Lafarge-Syria joined the second case. It is argued that Lafarge committed the crime of financing terrorism and is complicit in war crimes and crimes against humanity.

An internal investigation was run at the cement company. The management of LafargeHolcim confirmed the accusations made by *Le Monde* and admitted to significant errors of judgment. It recognized that the measures taken to maintain cement plant operations were unacceptable. However, the company denies that payments were deliberately made to the Islamic State. It argues that the funds were given to intermediaries without (local) management knowing their final destination.<sup>42</sup>

In June 2017, the prosecutor decided to open judicial investigation – which is a significant step compared to former cases where the civil parties had to bring the case themselves to the investigative judge – and appointed a college of three investigative judges to pursue investigation on: financing of a terrorist organisation, which is a crime punished by a maximum of ten years imprisonment and 225.000 Euros for natural persons, but a maximum of 1.125 million Euros for corporations; and risk of death or injury caused to another person, for which natural persons incur a maximum of one year imprisonment and a fine of 15.000 Euros and legal persons face a maximum of 75.000 Euros. Obviously the confiscation of criminal assets comes into consideration in this case.

### **3 Holding Corporations Accountable – the Jurisdictional Issue**

#### **3.1 Defining jurisdiction**

International jurisdiction in criminal matters is handled out in the Penal Code as to jurisdiction to prescribe (*compétence législative*), and in the Code of Penal Procedure as to jurisdiction to adjudicate (*compétence juridictionnelle*). Jurisdiction to prescribe (section 113-1 to 113-13 PC) triggers jurisdiction to adjudicate (section 689 to 689-13 CPP) in the sense that French criminal courts have jurisdiction where French Criminal Law is applicable. The Penal Code embodies territorial as well as extraterritorial applications of the French Criminal Law,

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<sup>42</sup> The internal investigation found that: ‘It appears from the investigation that the local company provided funds to third parties to work out arrangements with a number of these armed groups, including sanctioned parties, in order to maintain operations and ensure safe passage of employees and supplies to and from the plant. The investigation could not establish with certainty the ultimate recipients of funds beyond those third parties’ (2 March 2017).

whereas the provisions of the CPP only deal with extra-territorial situations, as jurisdiction to adjudicate based on the territoriality principle is considered as self-evident.

As a general observation, French law provides for a wide range of possibilities for domestic courts to try transnational crime, especially because it offers a very broad application of the territoriality principle. Even if a minor aspect of the offender's conduct has taken place on French territory, and this aspect does not constitute an element of crime, French criminal courts have jurisdiction. Extraterritorial application of French criminal law is also permitted with some material and important procedural restrictions. The principles of protection and universality are recognized too. As a whole, there is a strong willingness to avoid impunity resulting from the absence of jurisdiction, but the enforcement of this political commitment is more frequently achieved through an extensive understanding of the territoriality principle than through prosecutions based on extraterritoriality.

There is no specific legal framework on jurisdiction for corporations, although the rules of both the Penal Code and the Code of Criminal Procedure have been modified in 1992 at the same time as the criminal liability of legal persons was introduced in the New Penal Code.<sup>43</sup> This may create difficulties when extraterritorial jurisdiction based on the active personality principle or universality is at stake, but it does not preclude companies from criminal prosecution according to the broad interpretation of the territoriality principle given by the case-law.

## 3.2 Territorial Jurisdiction

Territoriality is the standard parameter for establishing jurisdiction in France. It is directly related to the principle of national sovereignty. To ensure that French law is obeyed within its territory, criminal courts must be able to try and punish the perpetrator of any act committed within this territory in violation of the domestic rules in force. It matters little that the act is perpetrated by or injures a foreigner. This idea, which seems obvious today, developed progressively with the rise of the nation-state, in particular during the 17<sup>th</sup> and 18<sup>th</sup> centuries. It was enshrined in the Civil Code in its original, 1804 version, in section 3(1): 'the laws of the police and security bind all who live within the territory'. This provision has had an undeniable impact on the issue of criminal law's territorial application.

### 3.2.1 *Legal Framework*

The principle of territoriality is set out in section 113-2(1) PC: 'French Criminal law is applicable to all offences committed within the territory of the French Republic'. This provision follows section 113-1, which defines French territory as including 'the territorial waters and air space which are attached to it'.<sup>44</sup> In addition, sections 113-3 and 113-4 provide for applying French law when a ship sails under the French flag or an airplane is registered in France. As the flag principle is not expressed at such in France, these provisions are deemed to constitute applications of the principle of territoriality.

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<sup>43</sup> Cristina Mauro (n 5) 12-15, esp. 12.

<sup>44</sup> Section 113-12 PC extends territorial jurisdiction beyond territorial waters in cases where an international treaty and the domestic law provide for it.

Moreover, section 113-5 provides for applying French criminal law to the accomplice of a crime (felony or misdemeanour) committed abroad that is punishable according to the foreign law, when the act of complicity was committed within French territory. The idea behind this provision is to enable French courts to try and punish the accomplice of an extra-territorial crime who has failed to account for his/her acts before the foreign court. This is why a procedural restriction reduces the incidence of the rule: the primary crime must have been 'established by a final decision of the foreign court'.

Other Penal Code provisions expand the application of French law by providing a substitute for a territorial link in cases where there is no territorial or personal jurisdiction, nor any other jurisdictional ground enabling such application. For example, recently introduced section 113-11 provides two such substitutes: provided the perpetrator has not already been the subject of a final judgment abroad for the same conduct (section 113-9), 'French Criminal law is applicable to felonies and misdemeanours committed on board or against aircraft not registered in France, or against persons aboard:<sup>45</sup> (2) where the aircraft lands in France after the commission of the felony or misdemeanour; or (3) where the aircraft was leased without crew to a natural or legal person whose main place of business, or failing this, whose permanent residence is on French territory'. Territorial jurisdiction is stretched to the limit here, which obviously reveals the willingness to avoid impunity.

### 3.2.2 Jurisprudence

There is a strong commitment of criminal courts to give a broad interpretation of the concept of territoriality in order to prosecute and try cross-border crimes (and sometimes even extraterritorial crimes) as territorial crimes. Unlike extraterritorial jurisdiction, territorial jurisdiction is very easy to bring into play: there is no requirement of double criminality, no need to gather an official accusation filed by the authorities of the country where the conduct has occurred or a complaint by the victim in France (section 113-8 CP, applicable to the active and passive personality principle), and the transnational double jeopardy rule (*ne bis in idem*) enshrined in section 113-9 CP does not apply.

Section 113-2(1) provides for territorial jurisdiction for offences 'committed within the territory of the French Republic', thereby implicitly requiring determination of where the offence was committed. Section 113-2(2) adds that '[a]n offence is deemed to have been committed within the territory of the French Republic where one of its *constituent acts* was committed within that territory' (emphasis added). The concept of 'constituent acts' (*faits constitutifs*) has not been defined neither by law nor by the courts, which obviously care for leaving the possibilities open. However, it is clear that 'constituent acts' differ from 'constituent elements' (*éléments constitutifs*), which are the elements of crime. The formula 'constituent elements' were enshrined in the law before the adoption of the New Penal Code in 1992. Former section 693 CPP read: 'An offence is considered to have been committed within the territory of the French Republic when the *act characterizing one of its constituent elements* occurs within this territory' (emphasis added). It was considered too restrictive by

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<sup>45</sup> The phrase 'or persons aboard' was added by the Law of 17 May 2011. See the discussion under the point 2.1.1.

the courts, which ignored its literal meaning. Under the New Penal Code, the *Cour de cassation* kept extending the reach of the territoriality principle. Legal commentators have decried this practice,<sup>46</sup> but the Court has not been deterred.

### *Theory of ubiquity*

The *Cour de cassation* has very early adopted the theory of ubiquity, which makes it possible to uphold French jurisdiction when either a constituent element or the result of the offence can be situated within French territory.<sup>47</sup> The courts never hesitate to take jurisdiction when the constituent element localized in France consists of the result of the offence. They even do so in cases where not the result, but solely the effects of the offence reach or are foreseen to reach French territory.

The effects of an offence are not defined in case law or doctrine. However, several cases may be cited in which the courts upheld French jurisdiction on the unacknowledged basis of aspects of the offence that are more or less direct consequences of the crime. For example, the *Cour de cassation* upheld French jurisdiction based on the spilling of a toxic substance into a body of water in Belgium, thus harming fish within French territory, although the elements of crime did not include the harm of plants or animals, but only the discharge of the toxic substance into the water.<sup>48</sup> In a case of counterfeiting, it considered that 'prejudice to authors' rights' in French territory suffices to trigger territorial jurisdiction.<sup>49</sup> Furthermore, in a case involving the crime of recording pornographic images of minors,<sup>50</sup> it situated the crime in France because, although the images were recorded in Thailand, actions taken for their distribution occurred in France. Since the images were not actually distributed, the Court in fact relied solely on the effects the author planned to produce in France. Lastly, with respect to media-related offences (under the Law of July 29, 1881) committed via Internet, several lower and appellate courts have held that merely receiving a message in France, even if sent from abroad, is enough to establish French jurisdiction. One legal commentator has summed up the case-law as follows: '[I]f an offence produces illicit effects in France, this is enough to found the jurisdiction of French criminal law and the French courts. There is no need to inquire into the correspondence between these effects and the constituent elements of the offence at issue.' The commentator approves of this solution, which he believes complies with international law.<sup>51</sup>

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<sup>46</sup> André Huet and Renée Koering-Joulin, *Droit pénal international* (3rd edn, Paris, PUF, 2005) n° 131 and 135; Michel Massé, 'La compétence pénale française dans l'espace depuis l'entrée en vigueur du nouveau code pénal' (1995) *Revue de science criminelle et de droit pénal comparé* 856; Raymond Legeais, 'L'évolution des solutions françaises de conflits de lois en matière pénale' in *Mélanges offerts à René Savatier* (Paris, Dalloz, 1965) 545 ff., esp. 552. Alain Fournier and Delphine Brach-Thiel, 'Compétence internationale' (October 2003) *Répertoire Dalloz pénal*, vol. n° 2, n° 115.

<sup>47</sup> Dating from the late 19th century (Cass. crim. 6 January 1872, *Dalloz* 72, 1, 142), this case preceded CCP section 693.

<sup>48</sup> Cass. crim. 15 Nov 1977, petition n° 77-90089, *Bull. crim.* n° 352.

<sup>49</sup> Cass. crim. 2 Feb. 1977, petition n° 75-90944, *Bull. crim.* n° 41; Cass. crim. 29 Jan. 2002, petition n° 01-83122; *Bull. crim.* n° 13.

<sup>50</sup> Cass. crim. 4 Feb. 2004, petition n° 03-81984, *Bull. crim.* n° 32.

<sup>51</sup> Didier Rebut, *Droit pénal international* (Paris, Dalloz, 2012) n° 52.

### *Any aspect of the offence linked to French territory*

In addition, courts find jurisdiction justified when not only the result or (sought) effects but also any aspect whatsoever of the offence, is situated within French territory. Many examples illustrate this.

The first concerns the offence's prerequisite. The offence of misappropriation requires that the misappropriated item first be given or transmitted to the perpetrator. Such transmission is not a constituent element of misappropriation, merely a prerequisite to it. However, the *Cour de cassation* considers that the prior transmission, within French territory, of an item that is thereafter misappropriated is sufficient to support French jurisdiction, even if the misappropriation per se occurs abroad.<sup>52</sup> Going even further, in a case of concealment that had totally been committed abroad, the *Cour de cassation* accepted that the prerequisite offence of theft, that had been committed in France – but was probably covered by the statute of limitation – is a constituent act of the concealment and triggers territorial jurisdiction for this latter offence, although it is undisputed under domestic criminal Law that theft and concealment are strictly autonomous crimes.<sup>53</sup>

It seems that the physical presence of the author and victim of the crime on French territory, at any time of the perpetration of the offence, is not necessary. In a case of misappropriation committed in Senegal by a Senegalese citizen to the prejudice of a Senegalese corporation, the fact that the misappropriated money was transferred through the French bank accounts of the author and the victim, was considered sufficient to justify territorial jurisdiction.<sup>54</sup> A further illustration concerns the crime of criminal enterprise (*association de malfaiteurs*), a 'root offence' the purpose of which is to plan 'derivative offences'. In a case in which the entire criminal enterprise was located abroad and did not eventually result in crime on French territory, the *Cour de cassation* ruled in favour of French jurisdiction on the offence of criminal enterprise because the crimes the alleged members of the enterprise intended to commit were to take place within French territory. The Court reasoned that 'plans to commit crimes in France is one of the constitutive acts of the offence of criminal enterprise', and even accepted subjecting a member who 'did not personally participate in the preparation' of these crimes to French jurisdiction.<sup>55</sup>

### *Doctrine of indivisibility*

French criminal courts have long considered that when several offences taken together form an indivisible whole, territorial jurisdiction extends to all the offences, provided some of the acts having a link with France are being or will be tried in the French courts. For example, it held that a kidnapping committed in Switzerland was subject to French jurisdiction because

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<sup>52</sup> Cass. crim. 12 Feb. 1979, petition n° 78-91482, Bull. crim. n° 60. See also Cass. crim. 13 October 1981, petition n° 80-93302; Bull. crim. n° 271 ; Cass. crim. 10 May 2007, petition n° 06-88783.

<sup>53</sup> Cass. crim. 26 September 2007, petition n° 07-83829, Bull. crim. n° 224.

<sup>54</sup> Cass. crim. 22 March 2006, petition n° 05-83494.

<sup>55</sup> Cass. crim. 20 February 1990, petitions n° 89-86610 and n° 89-86611, Bull. crim. n° 84, note by A. Fournier, 'Infractions commises à l'étranger: compétence des juridictions françaises pour une association de malfaiteurs et complicité' (1991) Recueil Dalloz 395.

the kidnapper then sequestered and murdered the child in France.<sup>56</sup> This case-law makes it possible to try all offences according to the same law, which makes sentencing more coherent. In another case where the criminal enterprise was operating in France for the purpose of committing crimes in Switzerland, the *Cour de cassation* used the doctrine of indivisibility to establish territorial jurisdiction not only for the criminal enterprise, but also for the extraterritorial crimes that had resulted from the criminal enterprise.<sup>57</sup>

Only recently, the *Cour de cassation* defined indivisibility as a logical link between two or more offences. It stated that the acts are indivisible 'when they are attached to each other through such a link that the existence of the ones of them would not be understandable without the existence of the others'.<sup>58</sup> In a complex cross-border case of corruption, concealment and money laundering concerning an international system of non-revealing sanctions incurred by athletes for doping, that was established within the International Federation of Associations of Athleticism, the reception of funds related to the offence by a member of the Federation in a French airport, and the spending of this money in France, were enough to justify territorial jurisdiction against the President of the Federation, a Senegalese citizen who had not set foot in France, for the whole of the offences.<sup>59</sup>

The *Cour de cassation* does not require that the acts founding French jurisdiction be capable of being considered primary in relation to other, secondary acts (doctrine of accessory). It has thus been held that France has jurisdiction to try thefts, attempted thefts and attempted murders committed in the Netherlands because these acts are indivisible from other, interrelated acts – falsification of documents, identity theft, vehicle theft and criminal enterprise – committed in France as preparatory acts by the same perpetrators.<sup>60</sup> However, the doctrine of accessory seems to justify jurisdiction when a primary act is committed in France but complicity was abroad. The *Cour de cassation* decided that French courts have jurisdiction over all of the acts.<sup>61</sup> As one commentator has noted, this is 'almost a case of inherent indivisibility'.<sup>62</sup> Though, the opposite case of an act of complicity committed in France when the primary act is extra-territorial brings more difficulties.

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<sup>56</sup> Cass. crim. 13 September 2000, petition n° 00-81537; For a different application, see Cass. crim. 15 March 2006, petition n° 05-83556, Bull. crim. n° 78.

<sup>57</sup> Cass. crim. 27 October 2004, petition n° 04-85187, Bull. crim. n° 263.

<sup>58</sup> Cass. crim. 31 mai 2016, petition n° 15-85920, Bull. crim. n° 165.

<sup>59</sup> Cass. crim. 20 September 2016, petition n° 16-84026.

<sup>60</sup> Cass. crim. 23 April 1981, petitions n° 79-90346 and n° 81-90489, Bull. crim. n° 116.

<sup>61</sup> Cass. crim. 19 April 1888, Dalloz périodique 1888.1.284; Cass. crim. 13 March 1891, Dalloz périodique 1892, 1.76; Cass. crim. 17 February 1893, Dalloz périodique 1894.1.32; Cass. crim. 7 Sept. 1893, Dalloz périodique 1896.1.434.

<sup>62</sup> D. Rebut (n 61).

### *Complicity of a crime committed abroad*

Pursuant to section 113-5 PC, an act of complicity<sup>63</sup> localized on French territory can be prosecuted in France separately from the primary act committed abroad,<sup>64</sup> under the triple condition that the primary act consists in a felony or a misdemeanour – according to French Law –, and is punishable according to the foreign law, and has been established by a final decision of the foreign court. These rules undoubtedly reflect a distinction between the principal and the accessory, as the fact that French jurisdiction is subject to three cumulative conditions is totally unheard of in the context of jurisdiction based on territoriality. Judgments on the base of territoriality according to section 113-5 are extremely rare, mainly because the requirement the primary act being established by a final decision of the foreign court is generally not met.<sup>65</sup> An evolution on this requirement has recently taken place for foreign bribery offences.<sup>66</sup>

### *Corporations and the territoriality principle*

The legal rules concerning the principle of territoriality are phrased in a way that they indisputably apply to offences committed by legal persons (art. 113-1 and 113-2 PC). The nexus is built between the criminal acts and the domestic territory, which makes it irrelevant whether the offender is a natural or a legal person. To the opinion of the report's author, this must be valid for art. 113-5 PC too, although the term '*quiconque*' (anybody) used in this provision refers to a natural person.<sup>67</sup>

There is no reason why the broad application of territoriality given by the case-law would not concern corporations. According to the French corporation's liability system, the offence must have been committed by organs or representatives of the legal person. These organs and representatives are mostly very senior managers, who are more likely to work at the headquarter in Paris – thus, to commit the offence by taking the relevant decisions on French territory – than to be based in a foreign country. In that sense, due to the actual phrasing and interpretation of section 121-2 PC, the wide understanding of the territoriality principle given by the courts is much more effective against French companies operating abroad than would be their prosecution under the active personality principle (employees acting in foreign subsidiaries are not anyway in the position to criminally bind the company).

Pursuant to section 113-5 PC, a French parent company may be prosecuted in France for acting as an accomplice in France to offences committed by a subsidiary abroad.<sup>68</sup> This is

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<sup>63</sup> The concept of complicity includes aiding, abetting and instigation (section 121-7 Penal Code).

<sup>64</sup> If the primary act, though committed abroad, has been tried in France on a jurisdictional basis other than territoriality, the Cour de cassation considers that section 113-5 PC does not apply, Cass. crim. 20 February 1990, Bull. crim. n° 84, note A. Fournier, (1991) Recueil Dalloz 395.

<sup>65</sup> Cass. Crim. 12 April 2005, petition n° 04-82318; Cass. crim. 29th January 2008, petition n° 07-82872 ; Cass. crim. 10 September 2008, petition n° 06-80687 and 07-84774.

<sup>66</sup> See below, 3.3.1.

<sup>67</sup> See the arguments for the interpretation of section 113-6 PC, below 3.3.1.

<sup>68</sup> Emmanuel Daoud et Annaëlle André, 'La responsabilité pénale des entreprises transnationales françaises : fiction ou réalité juridique ?' (2012) AJ Pénal 15 ff., eso. 19-20.

especially true as French Law qualifies the instigator of a crime as an accomplice.<sup>69</sup> However, the requirement that the primary act has been established by a final decision of the foreign court is generally not met, simply because the primary crime is not prosecuted abroad. This is why the association Sherpa pleads for the suppression of this legal requirement.<sup>70</sup> If the lawmakers were to provide for a specific legal framework on jurisdiction for large and multinational companies, the content of section 113-5 would indeed have to be adapted to the particular relationship existing between a parent company and its subsidiaries. In this context, the requirement of a final decision by the foreign court should be re-examined to the opinion of the report's author too, as well as the double criminality requirement. Incidentally, legislation has already been adapted in this sense for foreign bribery offences.<sup>71</sup>

### 3.3 Extraterritorial Jurisdiction

The Penal Code recognizes extraterritorial jurisdiction in different ways, through the principles of active and passive personality, the protective principle, as well as vicarious and universal jurisdiction. All these principles apply subsidiarily to the territoriality principle: they come into consideration only if there is no link to be established between the offence and the French territory. As territoriality is given a broad scope of application, it is no surprise that, in practice, there are few judgments based on extraterritoriality. However, the rareness of prosecutions for extraterritorial crimes may be due to high procedural requirements too, especially concerning the personality principle.

Generally speaking, the Law makes it easier for courts to try extraterritorial acts committed against French victims or interests (protective principle and passive personality principle) than to try French offenders for acts committed abroad or against foreign interests even or to enforce universal values (active personality and universality principles). The protective principle will not be handled out because the offences it concerns are not serious violations of human rights in the sense of this comparative analysis.<sup>72</sup> The same applies for vicarious jurisdiction,<sup>73</sup> giving effect to the principle of *aut dedere, aut judicare*. As a company cannot

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<sup>69</sup> Section 121-7(2) PC.

<sup>70</sup> Public reaction to the General Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights (Ruggie Principles), [www.asso-sherpa.org/reaction-publique-de-sherpa-plan-national-daction-mise-oeuvre-principes-directeurs-nations-unies-relatifs-aux-droits-de-lhomme-aux-entreprises](http://www.asso-sherpa.org/reaction-publique-de-sherpa-plan-national-daction-mise-oeuvre-principes-directeurs-nations-unies-relatifs-aux-droits-de-lhomme-aux-entreprises).

<sup>71</sup> New sections 435-6-2 and 435-11-2 PC were introduced by Law 2016-1691 of 9 December 2016 on transparency, fight against corruption and modernization of the economy, see below 3.3.1.

<sup>72</sup> Protective jurisdiction establishes jurisdiction over offences that harm goods or property of the State and, by extension, national interests (section 131-10 PC). In short, this principle is closely tied to national sovereignty. It applies for offences relating to the independence of the Nation, the integrity of its territory, its security, the republican form of its institutions, its means of defense and diplomacy, the safeguarding of its population in France and abroad, the balance of its natural surroundings and environment, and the essential elements of its scientific and economic potential and cultural heritage; forgery and counterfeiting of State seals, of coins serving as legal tender, banknotes or public papers; any felony or misdemeanour against French diplomatic or consular agents or premises committed outside the territory of the French Republic.

<sup>73</sup> Vicarious jurisdiction was established in section 113-8-1 PC by the Law N° 2004-204 of 9 March 2004 on adapting the justice system to developments in crime.

be searched for extradition, section 113-8-1 PC has no impact on the prosecution of companies.

### 3.3.1 *Active Personality Principle*

The principle of active personality is set out in section 113-6 PC, paragraph 1 of which provides that 'French criminal law is applicable to any felony committed by a French national outside the territory of the French Republic'. According to paragraph 2, it is also applicable 'to misdemeanours committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed'. In addition, section 113-11(1), 1° PC extends active personality to crimes committed by a French citizen on or against aircraft not registered in France or against persons aboard.

The foundations for this principle lie in the desire to control the behavior of nationals abroad, which cannot be accomplished through their extradition because France does not extradite its nationals (except within the European Union). As two authors put it, 'in exchange for the duty of protection owed French citizens by diplomatic or consular agents when outside France, French citizens have a duty to answer in France for offences they commit abroad'. They also suggest that a French offender may 'prefer the courts of the country of which she is a national because they are more familiar than the foreign courts'.<sup>74</sup> These reasons explain why the exercise of extraterritorial jurisdiction based on the section 113-6 is excluded when the author of the crime has already been judged abroad for the same offence. Section 113-9 PC expresses the transnational rule of double jeopardy (*ne bis in idem*).<sup>75</sup>

#### *French offender*

The principle of active personality applies when the offender is a French citizen. According to the final paragraph of section 113-6, it also applies to naturalized French citizens 'even if the offender has acquired French nationality after the commission of the offence of which he is accused'. It does not, however, extend to permanent residents within French territory, unless such an extension is provided by special statutory provisions applicable to the following offences: sexual aggression against a minor (art. 222-22(3) PC); procuring with regard to a minor (art. 225-11-2 PC); soliciting the prostitution of a minor (art. 225-12-3 PC); corruption of a minor, taking, recording or transmitting a pornographic image of a minor, and committing a sexual offence against a minor (all under art. 227-27-1 PC); participation in a mercenary activity (art. 436-3 PC); human cloning (art. 551-1-1 PC); and since recently, foreign bribery and bribery of international organisation's agents (art. 435-6-2 and 435-11-6 PC).

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<sup>74</sup> A. Huet and R. Koering-Joulin (n 37) n° 136 and 137.

<sup>75</sup> Juliette Lelieur, "'Transnationalising' *ne bis in idem*: How the rule of *ne bis in idem* reveals the principle of personal legal certainty' (September 2013) *Utrecht Law Review*, vol. 9, Issue 4, 198-210.

### *Offences concerned*

According to section 113-6, active personality concerns felonies<sup>76</sup> and misdemeanours,<sup>77</sup> not infractions.<sup>78</sup> French law governs whether the conduct is construed as a felony or misdemeanour, and thus whether it may give rise to prosecution in France. The qualification under foreign law has no effect in this regard. In case of a felony, extraterritoriality is easy to handle out, provided the offender is French. Core crimes are felonies, as well as some of the treaty crimes. In contrast, there are limitations for the prosecution of misdemeanours, which are the largest categories of offences in France.

### *Special requirements for extraterritorial misdemeanours*

As section 113-6(2) makes clear, double incrimination is required in the case of misdemeanours (e.g. risk of death caused to another person, serious pollution offences, domestic and foreign bribery, money laundering, financing of terrorism, etc.). It is not necessary that the law of the country where the offence has taken place provides for the same offence, but the offender's conduct must fall under its criminal provisions.

Moreover, procedural requirements set down by section 113-8 PC significantly limit the applicability of section 113-6 in case of misdemeanours. Prosecution is subject to two conditions. First, according to section 113-8(1), the prosecution must be initiated by the public prosecutor. Since French law largely grants victims – and NGOs defending the interests of victims – the ability to initiate prosecution for all categories of crimes (section 2 to 2-23 CPP), this rule constitutes a significant exception compared to the rules applied to the prosecution of territorial offences. It is important to remember that the French public prosecutor has prosecutorial discretion, so can choose not to prosecute even if all the material conditions are satisfied, and that its statutory independence from the executive is not fully guaranteed. When misdemeanours are committed abroad by French offenders and no public prosecution is launched, the civil society, victims and NGOs, remain powerless against public inertness.<sup>79</sup>

Second, section 113-8(2) requires that the victim has or her successors have filed a complaint in France; or that the authorities of the country where the conduct occurred have filed an official accusation. Consequently, even when public prosecution comes into consideration, it depends on steps being taken by the victim (although victims are unable to initiate prosecution in France themselves, they better file a complaint!) or the foreign authorities. Obviously, this requirement is inappropriate with regard to serious violations of human rights.<sup>80</sup>

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<sup>76</sup> Felonies (*crimes* in French) are offences punishable by a maximum imprisonment term of at least 15 years.

<sup>77</sup> Misdemeanours (*délits* in French) are offences punishable primarily by a maximum prison term of 10 years or less and/or a fine.

<sup>78</sup> Infractions (*contraventions* in French) are offences punishable by a maximum fine of 1500 Euros.

<sup>79</sup> Cass. Crim. 12 April 2005, petition n° 04-82318; Cass. Crim. 26 October 2010, petition n° 10-81342.

<sup>80</sup> Cristina Mauro (n 5) 12-15, esp. 14.

### *Exceptions to the special requirements*

Several fields of material criminal law are not concerned anymore with some or all of the special requirements, since exceptions were gradually granted by the lawmakers. They take various forms.

For a series of offences already mentioned,<sup>81</sup> which mainly concern sexual harm against a minor,<sup>82</sup> the requirement of double incrimination of section 113-6(2) and the procedural requirement that the victim has filed a complaint in France or that the authorities of the country where the conduct occurred have filed an official accusation 113-8(2) are waived. Still, the prosecution must be launched by the public prosecutor according to section 113-8(1).

Another notable exception concerns terrorism. According to section 113-13 PC introduced by the Law 2012-1432 of 21 December 2012 on safety and fight against terrorism, French criminal Law is applicable to felonies and misdemeanours of terrorism committed by a French national or by a permanent resident of France, without any further condition like double criminality and any procedural requirements (no application of section 113-8 and of the transnational double jeopardy set out in section 113-9).

Last but not least, a new legal framework has recently been adopted for foreign bribery and bribery of international organisation's agents, not because of a particular commitment against these offences, but as a reaction to the extraterritorial exercise of US criminal laws.<sup>83</sup>

### *Corporations and the active personality principle*

Section 113-6 PC was obviously not written for companies being prosecuted under the active personality principle. It mentions crimes committed 'by a French national' (*'par un Français'*). However, most scholars do not see any prohibition to apply section 113-6 to legal persons in this wording. Many of them do not even mention the question and take the applicability of active personality to corporations for granted.<sup>84</sup> From those who handle out the question, only one opposes the applicability of section 113-6.<sup>85</sup> A commentator argues that equal treatment between natural and legal persons commands corporations being criminally accountable in extraterritorial situations as well as natural persons are.<sup>86</sup> In a judgment of 2004, the *Cour de cassation* implicitly accepts a French company to be criminally liable for concealment of spoliated property in Nazi Germany, but bars the prosecution because one

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<sup>81</sup> See above under 'French Offender'.

<sup>82</sup> Sexual aggression against a minor (art. 222-22(3)); procuring with regard to a minor (art. 225-11-2); soliciting the prostitution of a minor (art. 225-12-3); corruption of a minor, taking, recording or transmitting a pornographic image of a minor, and committing a sexual offence against a minor (all under art. 227-27-1); participation in a mercenary activity (art. 436-3); and human cloning (art. 551-1-1).

<sup>83</sup> Explanations will be given below under 'New legal framework for foreign bribery and bribery of international organisation's agents'.

<sup>84</sup> For instance Mireille Delmas-Marty (n 10) 257-258 ; André Huet et Renée Koering-Joulin (n 37) n° 137 ; Bernard Bouloc, *Droit pénal général* (Paris, Dalloz, Précis, 24th edn, 2015) n° 330.

<sup>85</sup> David Chilstein, *Droit pénal international et lois de police. Essai sur l'application dans l'espace du droit pénal accessoire* (Dalloz, Nouvelle bibliothèque des thèses, vol. 24, 2003) n° 365 ff.

<sup>86</sup> Delphine Brach-Thiel, *Répertoire Pénal Dalloz, Compétence internationale*, n° 160.

of the requirement of section 113-8 were not met (the prosecution was not launched by the public prosecutor but by the civil party).<sup>87</sup>

A more serious question is whether the principle of double criminality applying to misdemeanour allows punishment of French corporations for crimes they commit in countries where the Law does not recognize corporate criminal liability. Whereas a legal commentator argues that the absence of foreign corporate criminal liability should not be an obstacle,<sup>88</sup> others are more cautious.<sup>89</sup> So far, the question was not dealt with by the *Cour de cassation* and remains open.

As to the question whether a company is French or not, the rules of commercial Law apply. In principle, a corporation is French if it has been registered in France. However, it may happen that a corporation is registered abroad but has an important activity and even its real headquarter in France, the registered office being fictive. Whereas civil lawyers consider the effective decisional center along the reality principle, criminal lawyers hesitate to engage in that direction.<sup>90</sup>

*New legal framework for foreign bribery and bribery of international organisation's agents.*

In recent years, several French companies were targeted by the US Department of Justice because of foreign bribery suspicions, whereas the crimes were not committed relative to US public agents, but to other foreign public agents. In order to escape prosecution in the US, these companies paid very high fines concluded with American authorities in settlements like non-prosecution or deferred prosecution agreements.<sup>91</sup> They had not been prosecuted by the French authorities – which obviously is deplorable.

Following these events, a very strong concern arose in France.<sup>92</sup> It was decided to tackle the 'delocalization' of the French foreign bribery litigations to the US, and to bring them back to domestic courts. To this purpose, the Law 2016-1691 of 9th December 2016 on transparency, fight against corruption and modernization of the economy created sections 435-6-2 and 435-11-2 PC.

These provisions make clear that active personality jurisdiction for foreign bribery and bribery of international organisation's agents not only concerns natural but also legal persons. They apply to French nationals, permanent residents in France as well as to any

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<sup>87</sup> Cass. crim. 9 November 2004, petition n° 04-81742, Bull. crim. n° 274.

<sup>88</sup> Cristina Mauro (n 5) 14.

<sup>89</sup> Mireille Delmas-Marty (n 10) 257. Bernard Bouloc, 'La responsabilité des entreprises en droit français' (1994) *Revue internationale de droit comparé* 669 ff., esp. 673.

<sup>90</sup> Mireille Delmas-Marty (n 10) 258-259.

<sup>91</sup> In 2014, Alstom agreed to pay 772 million US Dollars in order to escape prosecutions. In favour of a European response to this situation, Juliette Lelieur, 'La place de l'Union européenne et de son futur procureur financier dans la lutte contre la corruption' in Ph. Bonfils, L. Mucchielli and A. Roux (eds), *Comprendre et lutter contre la corruption* (Presses universitaires d'Aix-Marseille, Coll. Droits, pouvoirs & sociétés, 2015) 89-106.

<sup>92</sup> A Parliamentary Mission was set up for the purpose of seeking responses. In October 2016, it published the *Rapport d'information sur l'extraterritorialité de la législation américaine* (180 pages!), <[www.assemblee-nationale.fr/14/pdf/rap-info/i4082.pdf](http://www.assemblee-nationale.fr/14/pdf/rap-info/i4082.pdf)>.

'person exercising his/her/its economic activity – or part of this activity – on French territory'. Additionally, they remove the double criminality requirement of section 113-6(2), they paralyze all procedural requirements of section 113-8 and, eventually they suppress the requirement set by section 113-5 PC that a final decision of the foreign court establishes the primary offence for French courts to have jurisdiction on the act of complicity committed in France (e.g. the instigation or instructions of the parent company headquartered in Paris to its foreign subsidiary to bribe foreign public agents, or simply the acquiescence of the a contract providing for a bribe or the financing of the bribe).

The law of 9 December 2016 reveals that a strong political will may considerably improve the effectiveness of the principle of active personality. The same was true for the Law 2012-1432 of 21 December 2012 on safety and fight against terrorism, which created section 113-13 PC.

### 3.3.2 *Passive Personality Principle*

The principle of passive personality is set out in section 113-7 PC: 'French Criminal law is applicable to any felony, as well as to any misdemeanour punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place'. Section 113-11(1), 1° extends the principle of passive personality to cases of felonies or misdemeanours committed on or against aircraft not registered in France or against persons on board when the victim is a French national.

In theory, the passive personality principle receives very broad application, not only because section 113-7 PC concerns all felonies and misdemeanours punishable by imprisonment but also for the reason that it does – surprisingly – not require that the conduct be incriminated in the foreign country where it occurs. In practice, the procedural conditions of section 113-8 discussed above with respect to jurisdiction based on active personality also apply to passive personality. They constitute significant obstacles to trying cases in France. However, the principle has found application in cases of economic and financial crime, to the benefit of French companies that operate abroad then seek the protection of the French courts.<sup>93</sup>

Jurisdiction based on passive personality frequently results in trials *in absentia*, which means that the sentences are rarely carried out. In such cases, repressive effectiveness is merely symbolic.<sup>94</sup> Several authors have therefore suggested reducing the scope of this principle to offences qualified as felonies or the most serious crimes, and/or by subjecting it to the requirement of double incrimination.<sup>95</sup>

In the absence of any double criminality requirement, there are no other obstacles to prosecute and try a foreign company in France according to the passive personality principle

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<sup>93</sup> Eric Cafritz and Omer Tene, 'Plaidoyer en faveur d'une restriction de la compétence personnelle passive en droit français' (2003) *Revue de sciences criminelles* 733 ff., esp. 735-737.

<sup>94</sup> Renée Koering-Joulin, 'Appréciation critique du droit français de la compétence personnelle passive' in *Les droits et le Droit, Mélanges dédiés à Bernard Bouloc* (Paris, Dalloz, 2007) 529 ff., 534-535.

<sup>95</sup> Renée Koering-Joulin (n 83); Eric Cafritz and Omer Tene (n 82); D. Brach-Thiel, 'La victime d'une infraction extraterritoriale' (2010) *Revue de sciences criminelles* 819 ff., spéc. 822 and 823.

than the procedural conditions of section 113-8 PC and the transnational rule double jeopardy (*ne bis in idem*) set out in section 113-9 CP. However, in practice there are very few cases.

### 3.3.3 *Universal jurisdiction*

Unlike the other bases of jurisdiction, which are set out in the Penal Code, universal jurisdiction emanates from the Code of Penal Procedure, section 689-1 of which provides: 'In accordance with the international Conventions quoted in the following sections, a person guilty of committing any of the offences listed by these provisions outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts. (...)'. Repression is justified by the concern for not allowing the most serious crimes flaunting international values to go unpunished. The authority to define conduct as criminal and try perpetrators is derived from international conventions for the repression of such crimes.

The offences that may found universal jurisdiction are enumerated in section 689-2 to 689-12 CPP, by reference to the international conventions concerning these offences. They are: torture and other cruel, inhuman or degrading treatment or punishment (section 689-2); serious acts of terrorism (section 689-3, 689-9 and 689-10); offences against the protection and control of nuclear substances (section 689-4); hijacking of aircraft or ships, violations of port or airport security, and grave offences committed in this context (section 689-5, 689-6 and 689-7); harm to the financial interests of the European Union and corruption of civil servants of the European Union or of any European Union member state (section 689-8); crimes subject to the jurisdiction of the ICC (section 689-11); and offences against the social legislation in the area of ground transportation committed in the European Union (section 689-12).

#### *Corporations and universal jurisdiction*

According to section 689-1, the exercise of universal jurisdiction is subject to the requirement that the person 'happens to be in France'. This wording makes it difficult to apply universal jurisdiction to corporations, as the law gives no indication as how to characterize the presence of a foreign legal person on French territory. A solution may be to require that the corporation possesses property<sup>96</sup> or has an economic activity in France. For now, there has been no illustration of a corporation's prosecution under the principle of universal jurisdiction.

#### *Universal jurisdiction and ICC crimes*

The provisions of section 689-11 were inserted by the Law of 9 August 2010<sup>97</sup> in order to implement the ICC Statute. They elicited sharp criticism<sup>98</sup> because universal jurisdiction is

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<sup>96</sup> Cristina Mauro (n 5) 15.

<sup>97</sup> Law No 2010-930 on adapting the Criminal Code to the International Criminal Court.

<sup>98</sup> Esp. Amani Gorgoza, 'La compétence universelle en matière de crimes contre l'humanité', in V. Malabat, B. de Lamy, M. Giacomelli (eds) *La réforme du code pénal et du code de procédure pénale. Opinio doctorum* (Dalloz,

subject to highly unusual requirements. First, the accused must actually reside in France, not simply be present within the territory. Obviously the lawmakers wanted to avoid universal jurisdiction to apply to corporations, which reflects the position of the ICC Statute itself. It looks like companies producing and selling weapons must be protected from prosecution for complicity of genocide, crimes against humanity and war crimes. Second, double incrimination is required (but may be waived if the home country of the accused is a party to the Rome Statute). Last but not least, according to section 689-11(2), prosecution may be initiated only upon the request of the public prosecutor, if no international or national court requests the surrender or extradition of the person. It was said that section 689-11 institutes 'highly locked off' universal jurisdiction<sup>99</sup> for international crimes.

### 3.4 Conflicts of jurisdiction

France is rather dominant in claiming jurisdiction in cross-border cases and there is no doubt that problems of positive conflicts of jurisdiction arise from this attitude. There has been no particular interest in elaborating a mechanism to solving these conflicts at national level,<sup>100</sup> but France has transposed EU Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings into national legislation.<sup>101</sup> The resulting legislation has been coldly received by the scholarship.<sup>102</sup>

## 4 Compliance and companies' liability

### 4.1 Public and scientific debate

In the last fifteen years, compliance and corporate social responsibility (*conformité* and *responsabilité sociale de l'entreprise* – RSE) have increased their influence and gained a significant role in France. They are nowadays recognized as means to prevent the commission of violations of human rights by NGOs as well as by the French government. A public discussion takes place between stakeholders through the 2012 established 'Plateforme RSE'.<sup>103</sup> The awareness that violations of human rights abroad may be linked to investments or business operations by French companies has arisen, especially since the 2013 Rana Plaza collapse because French brands were produced in the building. The Ministry of Foreign Affairs encourages corporate social responsibility in the context of developing aid, and in April 2017, it published the National Action Plan for the Implementation of the UN Guiding

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2009) 36 ff.; Delphine Brach-Thiel (n 84); *contra* David Chilstein, 'De la retenue en matière de compétence universelle', in *La réforme du code pénal et du code de procédure pénale. Opinio doctorum* 25 ff., esp. 30.

<sup>99</sup> Delphine Brach-Thiel, Répertoire Pénal Dalloz, Compétence internationale, n° 210.

<sup>100</sup> In favour of a European strategy on conflicts of jurisdictions, Juliette Lelieur, 'L'Union européenne face aux conflits de compétences pénales', in D. Brach-Thiel and F. Fourment (eds) *Questions de droit pénal international, européen et comparé, Mélanges en l'honneur du professeur Alain Fournier* (Presses universitaires de Nancy - Éditions universitaires de Lorraine, 2013) 257-293.

<sup>101</sup> Law n° 2015-993 of 17 August 2015 on adapting criminal procedure to EU-Law.

<sup>102</sup> Blandine Thellier de Poncheville, 'La transposition manquée de la décision-cadre 2009/948/JAI du Conseil du 30 novembre 2009 relative aux conflits de compétences' (2015) AJ Pénal 528.

<sup>103</sup> <www.strategie.gouv.fr/chantiers/plateforme-rse>.

Principles on Business and Human Rights.<sup>104</sup> In addition, since Paris hosted the United Nations Climate Change Conference, COP 21, in 2015, the French public opinion increasingly acknowledges the need to protect the environment of developing countries.

However, there is some skepticism towards compliance programs, because of their procedural character. Many French people think that the processes defined by companies are just a façade or a commercial instrument. They do not believe in their effectiveness. Compliance is seen more or less as an Anglo-Saxon importation that has reached France through the globalized business, but that is not likely to change practices if overriding financial interests are at stake.

The legal literature includes the concepts of compliance and corporate social responsibility in analyzing the norm<sup>105</sup> and evaluates the ethical standards defined by companies against the rules produced by the State.<sup>106</sup> It also tries to find out how legal liability may be triggered out of social responsibility – in other words, how to bring a case to court if a company breaches a rule contained in its compliance program.<sup>107</sup> Though, the main discussion is about civil liability for damages produced towards third parties rather than about criminal liability of individuals and corporations. At most, criminal liability is taken into consideration for involuntary offences.<sup>108</sup> In the *Erika* judgment, the breach of a soft-law rule included in the compliance program of Total was considered by the judges as imprudence in criminal sense and the parent company was punished for involuntary pollution.<sup>109</sup> However, the link between a bad corporate culture and a criminal punishment of the company for a voluntary crime, characterised by criminal intention, still needs to be built.

#### 4.2 Law about the duty of due diligence of parent companies and main contractors

In early 2017, the Parliament adopted a much-awaited law establishing a duty of vigilance for parent and subcontracting companies in order to prevent serious violations with respect to human rights and fundamental freedoms, and the health and safety of persons, and the

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<sup>104</sup> <[http://www.diplomatie.gouv.fr/IMG/pdf/tableaudhe\\_09052017\\_version\\_finale\\_cle8ce9e7.pdf](http://www.diplomatie.gouv.fr/IMG/pdf/tableaudhe_09052017_version_finale_cle8ce9e7.pdf)>.

<sup>105</sup> Véronique Wester-Ouisse, 'Le droit pénal face aux codes de bonne conduite' (2000) *Revue de science criminelle et de droit pénal comparé* 351; Christine Neau-Leduc, 'La responsabilité sociale de l'entreprise : quels enjeux juridiques ?' (2006) *Droit social* 952; Roxana Family, 'La RSE : du concept à la norme' (2013) *Recueil Dalloz* 1558.

<sup>106</sup> Pascale Deumier, 'La RSE et les droits fondamentaux' (2013) *Recueil Dalloz* 1564; Nicolas Mathey, 'La responsabilité sociale des entreprises en matière de droits de l'homme' (2010) *Cahiers de droit de l'entreprise* n° 3, dossier 13.

<sup>107</sup> R. De Quenaudon et K. Martin-Chenut (eds), *La RSE saisie par le droit : perspectives interne et internationale* (Paris, Pedone, 2016).

<sup>108</sup> Emmanuel Daoud et Annaëlle André, 'La responsabilité pénale des entreprises transnationales françaises : fiction ou réalité juridique ?' (2012) *AJ Pénal* 15; Madeleine Lobe Lobas, 'L'engagement volontaire RSE au service de la prevue pénale' (March 2014) *Environnement* n° 3, étude 4.

<sup>109</sup> Laurent Neyret, *De l'approche extensive de la responsabilité pénale dans l'affaire Erika, Environnement et développement durable*, 2010, étude 29; Arnaud Montas et Gildas Roussel, 'Les principaux apports de la décision de la Cour de cassation dans l'affaire Erika', note sous Cass. Crim. 25 September 2012, petition n° 10-82.938 (2012) *AJ Pénal* 574-581.

environment.<sup>110</sup> According to the new section L. 225-102-4 of the commercial code, big companies headquartered in France must establish, publish and implement an annual vigilance plan deemed to identify and assess any serious risks relating to the business activities of the company – and those of its subsidiaries, controlled companies, suppliers and subcontractors. The scope of the Law is narrow. Only companies whose head office is in France and which have more than 5.000 employees domestically, directly or through their subsidiaries, or more than 10.000 employees worldwide, are concerned. The plan must include provision to: map, identify, analyze and rank risks; implement procedures to evaluate the company, subsidiaries, subcontractors and suppliers against the risks; and put in place an alert mechanism to report on risks and put in place a monitoring scheme to assess the efficacy of measures implemented.

Originally, the Law included a civil fine mechanism in case companies breach their obligations under the new duty of vigilance.<sup>111</sup> The civil appellation of the fine did not hide its criminal character and it was no surprise that the Constitutional Council declared the provisions relating to the fine unconstitutional because they violated the principle of criminal legality.<sup>112</sup> Moreover, in the first draft of the Law, there was a provision adding the breach of a duty of vigilance to the grounds for involuntary offences set down in the Penal Code.<sup>113</sup> According to this provision, the failure to establish, publish or implement the annual vigilance plan would have triggered companies' criminal liability if persons died or were injured in an accident that could have been prevented through the implementation of the plan. But this audacious clause was removed during the Parliamentary debate, which wiped out any chance of building a link between the vigilance obligation of a company and its criminal responsibility.

In its final version, the Law of 27<sup>th</sup> of March 2017 provides for a new tort action in Section L. 225-102-5 of the commercial code. The civil liability of companies which failed to comply with their obligations under section L. 225-102-4 may be engaged if damage has occurred and the claimer is able to prove that the damage could have been prevented through the implementation of the vigilance plan. The burden of proof has not been reversed by the legislator and therefore, it is unlikely that actions will be successful.<sup>114</sup> Worst, it is to fear that companies which have produced damage after they have implemented a vigilance plan

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<sup>110</sup> Law No 2017-399 of 27 March 2017 relating to the duty of vigilance of parent companies and ordering companies.

<sup>111</sup> The fine went up to 10 million Euros when companies failed to establish or publish a vigilance plan and up to 30 million Euros when this failure resulted in damages that would otherwise have been preventable.

<sup>112</sup> Decision No 2017-750 DC of 23 March 2017. Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (June 2017) *Business and Human Rights Journal*.

<sup>113</sup> Section 3 of the Proposition of Law of 6 November 2013: 'Au troisième alinéa de l'article 121-3 du code pénal, les mots : "ou de sécurité" sont remplacés par les mots : "de sécurité ou de vigilance".'

<sup>114</sup> Sophie Schiller, 'Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre' (13 avril 2017) *La Semaine juridique Entreprises et Affaires* n° 15, 1193. Several authors encourage the case-law to establish a presumption of causality for the purpose of making the law effective, see Anne Danis-Fatôme et Geneviève Viney, 'La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre' (2017) *Recueil Dalloz* n° 28, 1610.

according to Section L. 225-102-4, will use their compliance with this provision as a defense argument when victims bring a traditional tort action against them according to the civil code.

### 4.3 Transposition of the Non-Financial Reporting Directive

As soon as in 2001, France had included the obligation to disclose non-financial information for companies in its legal framework. Although the obligation included social and environmental matters since 2012, it was not completely compliant with Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. A Ministerial Order adopted in July 2017<sup>115</sup> modified several provisions of the commercial code and other legislation for the purpose of adapting domestic Law to the European requirements. As a result, small and medium undertakings are not subjected to the obligation of disclosure anymore, but only companies with more than 500 employees and a turnover of at least 100 million Euros. Subsidiaries are not obliged either, provided that their parent company discloses information concerning them in a consolidated version. The former 'report on corporate social responsibility' has turned to a 'report on non-financial performance' and must be posted and maintained on the website of the undertaking or group for five years.

## 5 Conclusion: Proposals for Reform of the Legal Framework

In sum, above the well-known difficulty to gather evidence of a crime committed abroad, the main obstacle to prosecuting companies for violations of human rights is probably the French corporation's criminal liability system itself. Companies are mostly perceived as entities that must repair the damages they have caused by accident, but not more. There is little awareness that a company may intentionally commit a crime on the basis of its wrongful or bad corporate culture (confusion between civil and criminal liability is easily made in France because victims of a crime usually claim for civil compensation before criminal courts). The phrasing of Section 121-2 PC as well as its enforcement by courts seems to shift CEOs from their individual criminal responsibility, especially for involuntary offences, more than to make companies criminally liable for voluntary offences they have committed as real economic entities.<sup>116</sup> This is why a new phrasing of Section 121-2 PC has been suggested earlier in this report.<sup>117</sup> Additionally, the existence of non-incorporated multinational enterprises and global groups, as well as the particular relationship between a parent company and its subsidiary must be discussed from a criminal law perspective. The legal figures of primary offence and complicity are obsolete in the globalized business context. New and effective accountability chains must be established.

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<sup>115</sup> Order No 2017-1180 of 19 July 2017 on disclosure of non-financial information by certain, large undertakings and groups.

<sup>116</sup> Véronique Wester-Ouisse, 'Responsabilité pénale des personnes morales et dérivés anthropomorphiques' (2009) *Revue pénitentiaire et de droit pénal* 63-73.

<sup>117</sup> See 2.1.1.

Obviously, it would be helpful to have a legal framework dedicated to the application of extraterritorial jurisdiction to corporations. Many legal questions addressed in this report could be clarified, especially the question whether a French company acting in a country where criminal liability of legal persons is not foreseen, may be punished by French courts. The question of the relationship between a parent company and its subsidiary (or between the decisional center of the group and the operational offices) needs to find new solutions from a jurisdictional perspective too. Probably more unilaterality is needed in the application of criminal Law, as powerful companies know how to work across the cumulative legal requirements of different national legal systems.

In the last years, many adaptations of the active personality principle have taken place, especially for sexual offences on children abroad, on terrorism and lastly on bribery. The solutions to make French Criminal Law applicable to foreign cases and assess domestic court's jurisdiction are well known. However, it looks like when economic interests are at stake, French lawmakers only react under pressure – like when French companies are fined in the US. Since the French bank BNP-Paribas paid in 2014 a record of 8.83 billion US Dollars (6.45 billion Euros) sanction for violating US legislation on transactions with Cuba, Iran and Sudan, an important discussion has started on extraterritorial application of (foreign) Law.<sup>118</sup> Hopefully it will not only end up in measures reacting to US criminal policy, but in an overall new concept for French criminal policy regarding serious violations of human rights worldwide.

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<sup>118</sup> *Rapport d'information sur l'extraterritorialité de la législation américaine*, <[www.assemblee-nationale.fr/14/pdf/rap-info/i4082.pdf](http://www.assemblee-nationale.fr/14/pdf/rap-info/i4082.pdf)>.

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# GERMAN REPORT ON PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW

By Martin Böse \*

## 1 Introduction

In contrast to civil and administrative law, the German *Strafgesetzbuch* (Criminal Code –CC) does not provide for a liability of legal persons because they lack personal (i.e. individual) guilt (*societas delinquere non potest*). Instead of criminal sentences, the legislator provided for administrative sanctions against corporations and thereby resolved the conflict between doctrinal opposition to corporate criminal liability and the practical need for adequate means to fight corporate crime. Nevertheless, the German criminal justice system still focuses upon the individual offender (the natural person), and the proceedings against corporations are rather the exception than the rule. Moreover, the regulatory framework connotes a less serious misconduct and allows for more flexibility in dealing with cases than the law of criminal proceedings. For these reasons, there is no in-depth discussion on corporate criminal liability for violations of international criminal law in Germany.

## 2 General Framework for Prosecuting Corporations for Violations of International Criminal Law

### 2.1 Legal Rules governing the prosecution of corporations

#### 2.1.1 Substantive Criminal Law establishing criminal liability

The legal basis for corporate fines (*Verbandsgeldbuße*) forms part of the *Ordnungswidrigkeitengesetz* (Regulatory Offenses Act) of 1968 (ROA). According to § 30(1) ROA, an administrative fine (*Geldbuße*) may be imposed on a legal person if an organ, a representative, or a person with functions of control within the legal person has committed a criminal or a regulatory offense (*Ordnungswidrigkeit*). § 30 ROA follows the imputation model as the liability of the corporation is based on the criminal conduct of its leading persons, in particular, its legal representatives.<sup>1</sup> Furthermore, under § 130 ROA, a corporate fine can be imposed if an ordinary employee committed an offense on behalf of the legal person and a representative of the corporation had failed to prevent or discourage the commission of that offense through proper supervision. As a consequence, a lack of organization and supervision (*Organisationsverschulden*) is considered as the main element of corporate guilt that legitimates a corporate sanction.<sup>2</sup>

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<sup>1</sup> Klaus Rogall, '§ 30' in Lothar Senge (ed), *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten* (4th edn, C.H. Beck 2014) para 8; Klaus Tiedemann, *Wirtschaftsstrafrecht – Einführung und Allgemeiner Teil* (4th edn, Vahlen 2014) para 375.

<sup>2</sup> Klaus Tiedemann, 'Die "Bebußung" von Unternehmen nach dem 2. Gesetz zur Bekämpfung der Wirtschaftskriminalität' [1988] *Neue Juristische Wochenschrift* 1169, 1172-1173.

§ 30 ROA applies to all kinds of crimes and regulatory offenses. However, the responsibility of the corporation presupposes that the perpetrator representing the corporation breached one of the corporation's legal obligations or that the corporation was enriched (or should have been enriched) by the offense (§ 30(1) ROA). These conditions are alternatives; thus, it is not necessary to establish that the corporation has violated its obligations if one of the other conditions (enrichment or intended enrichment) is met.

### 2.1.2 Procedural Law governing criminal prosecution & Actors (Prosecution and other authorities, victims, NGOs, courts)

In principle, the sanction on the natural person and the corporate fine shall be imposed in one and the same proceeding (§ 444(1) Code of Criminal Procedure – CCP; § 88(1) ROA). However, if no proceedings against the natural person are instituted, or if those proceedings are terminated, the corporation may be fined in independent proceedings (§ 30(4)1 ROA; § 444(3) CCP, § 88(2) ROA). In cartel cases, the federal or regional cartel office is exclusively competent to impose a corporate fine even if a criminal (rather than a regulatory) offense has been committed (§ 82 Act against Restraints of Competition – ARC). As a consequence, the corporation and the natural person are prosecuted in separate proceedings.

According to § 444(1)2 and § 444(2)2 CCP, the provisions on the legal status of a person whose assets shall be confiscated (§§ 426 et seq. CCP) shall apply *mutatis mutandis* to a corporation that is to be fined for a crime; the same applies to corporations held responsible for regulatory offenses (§ 88(3) ROA; see also § 46(1) ROA). The reference to the provisions on confiscation is explained by the fact that the corporate fine was previously thought to be a collateral consequence of the individual's conviction (*Nebenfolge*): once the legislator removed this designation, the punitive character of the corporate fine was beyond doubt and the prevailing academic opinion held that the corporation must be awarded the procedural rights of a defendant in criminal proceedings.<sup>3</sup>

Accordingly, the corporation has a right to be heard (§ 444(2)2, § 426(1) CCP) and must be summoned to the main hearing (§ 444(2)1 CCP). The corporation has the rights of the defendant in criminal proceedings (§ 444(2)2, § 427(1)1 CCP). However, the legal status of the corporation does not fully correspond with that of a human defendant in criminal proceedings: According to the Federal Constitutional Court, the constitutional guarantee of the privilege against self-incrimination is inapplicable to corporations because it is an emanation of the guarantee of human dignity under Art. 1(1) of the Constitution (Basic Law – *Grundgesetz*).<sup>4</sup> This judgment has been heavily criticized as incompatible with the punitive function of the corporate fine and as insufficiently sensitive to the need for basic guarantees in proceedings against both natural and legal persons.<sup>5</sup> In any case, legislation provides the privilege against self-incrimination to corporations as well (§ 444(2)2, § 427(1)1, § 163a(4)2,

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<sup>3</sup> Rogall, '§ 30' (n 2) para 196, with further references.

<sup>4</sup> BVerfGE (Federal Constitutional Court of Germany – official court reports) 95, 220, 242.

<sup>5</sup> Martin Böse, *Wirtschaftsaufsicht und Straferfolgung* (Mohr Siebeck 2005) 196 et seq., with further references.

§ 136(1)2, § 243(4)2).<sup>6</sup> Nevertheless, the legislator has explicitly provided for exceptions from this privilege for corporations in competition law (§ 81a ARC).

Pursuant to the general rules on representation, the corporation exercises its procedural rights through its legal representatives, in particular, the members of its governing body.<sup>7</sup> Of course, to avoid a conflict of interests, legal representatives charged with the offense for which the corporation is to be fined are excluded from the pool of possible representatives.<sup>8</sup> The corporation shall be summoned to the trial; if, however, its representative fails to appear with no sufficient excuse, the trial may be conducted in absentia (§ 444(2)1 CCP).

## 2.2 Principles of Jurisdiction /Building the nexus

The rules on criminal jurisdiction form part of the general part of the Criminal Code (§§ 3 to 7 CC) and the ROA (§ 5). With these rules, the German legislator has exercised his jurisdiction to prescribe, but they are also the legal basis to exercise jurisdiction to adjudicate. Thus, the function of these provisions is twofold, i.e. determining the scope of substantive criminal law (jurisdiction to prescribe) and the choice of a (domestic) forum (jurisdiction to adjudicate).<sup>9</sup> The distinction between the two functions will be relevant in cases where German authorities exercise derivative jurisdiction (principle of vicarious jurisdiction, see § 7(2) No. 2 CC).<sup>10</sup>

German law refers to the following jurisdictional bases: the territoriality principle (§ 3 CC; see also § 5 ROA), the flag principle (§ 4 CC; see also § 5 ROA), the protective principle (§ 5 No. 1 to 5, 10, 12 to 16 CC), the principles of active (§ 5 No. 6, 8 to 9a, 11 to 17; § 7(2) No. 1 CC) and passive (§ 5 No. 6, 9a, § 7(1) CC) personality, universal jurisdiction (§ 6 CC) and vicarious jurisdiction (§ 7(2) No. 2 CC).<sup>11</sup> However, the general provisions implementing the principles of active and passive personality (§ 7(1) and (2) No. 1 CC) are subject to the double criminality requirement.

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<sup>6</sup> See further, Rogall, '§ 30' (n 2) para 196.

<sup>7</sup> Rogall, '§ 30' (n 2) paras 198 ff.

<sup>8</sup> Klaus Rogall, *ibid*, para 200.

<sup>9</sup> Kai Ambos, 'Vor § 3' in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum StGB* (3rd edn, C.H. Beck 2017) para 4; Martin Böse, 'Vor § 3' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ulrich Paeffgen (eds), *NK-StGB* (5th edn, Nomos 2017) paras 9-10.; Frank Meyer, 'Country Report "Germany"' in Martin Böse, Frank Meyer and Anne Schneider (eds), *Conflicts of Jurisdiction in Criminal Matters in the European Union* (Nomos 2013) vol I: National Reports and Comparative Analysis, 141, 169.

<sup>10</sup> Martin Böse (n 5) paras 10-11.

<sup>11</sup> For a detailed overview see Meyer, 'Country Report "Germany"' (n 9) 141 ff.

### 2.3 International Law / Human rights framework

The human rights framework is mainly based upon the ECHR<sup>12</sup> and the ICCPR<sup>13</sup> and the international treaties on the core crimes of international law (genocide<sup>14</sup> and war crimes<sup>15</sup>) and other violations of human rights (e.g. torture<sup>16</sup>), terrorism<sup>17</sup> and organised crime<sup>18</sup> (e.g. trafficking in human beings,<sup>19</sup> smuggling of persons,<sup>20</sup> corruption<sup>21</sup>); with regard to the latter, EU legislation (framework decisions<sup>22</sup> and directives<sup>23</sup>) plays an important role, too.

### 2.4 Framework for Prosecuting a Cross-Border Case

A criminal investigation can be triggered by the victim or by the foreign state where the crime has been committed, in particular if a request for extradition will not be granted. In principle, the prosecutor is obliged to initiate proceedings if there are sufficient factual indications that a crime has been committed (§ 152(2) CCP). Nevertheless, the principle of mandatory prosecution is riddled with many exceptions, in particular with regard to crimes that have been committed abroad (§§ 153c, 153f CCP).

In principle, the criminal investigation does not require the presence of the defendant, but his absence might provide a reason to terminate proceedings (see, with regard to core crimes of international law, § 153f(1)1 and (2) 1 No. 3 CCP). In any case, the defendant shall be heard before the indictment is filed (§ 163a(1)1 CCP).

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<sup>12</sup> European Convention on Human Rights of 4 November 1950, Federal Law Gazette (*Bundesgesetzblatt*) 1952 II p. 685, 953.

<sup>13</sup> International Covenant on Civil and Political Rights of 19 December 1966, Federal Law Gazette (*Bundesgesetzblatt*) 1973 II p. 1534.

<sup>14</sup> UN Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, Federal Law Gazette (*Bundesgesetzblatt*) 1954 II p. 730.

<sup>15</sup> Geneva Convention I-IV of 12 August 1949, Federal Law Gazette (*Bundesgesetzblatt*) 1954 II p. 783, 813, 838, 917.

<sup>16</sup> UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, Federal Law Gazette (*Bundesgesetzblatt*) 1990 II p. 247.

<sup>17</sup> International Convention for the Suppression of Terrorist Bombings of 15 December 1997, Federal Law Gazette (*Bundesgesetzblatt*) 2002 II p. 2507; International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, Federal Law Gazette (*Bundesgesetzblatt*) 2003 II p. 1924.

<sup>18</sup> UN Convention against Transnational Organised Crime of 15 November 2000, Federal Law Gazette (*Bundesgesetzblatt*) 2005 II p. 954.

<sup>19</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organised Crime of 15 November 2000, Federal Law Gazette (*Bundesgesetzblatt*) 2005 II p. 995.

<sup>20</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organised Crime of 15 November 2000, Federal Law Gazette (*Bundesgesetzblatt*) 2005 II p. 1007.

<sup>21</sup> UN Convention against Corruption of 31 October 2003, Federal Law Gazette (*Bundesgesetzblatt*) 2014 II p. 763.

<sup>22</sup> Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime [2008] OJ L300/42.

<sup>23</sup> Directive (EU) 2011/36 of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims [2011] OJ L101/1; Directive (EU) 2017/541 of 15 March 2017 on combating terrorism [2017] OJ L88/6.

Corporate fines form part of the law of regulatory offences (§ 30 ROA) which are not subject to the principle of mandatory prosecution. By contrast, the competent authority has discretion whether or not to impose a corporate fine (§ 47 ROA). An investigation (and even a trial, see supra 2.1.2), can be conducted in absentia. The practical relevance of cross-border cases, however, is rather limited (see also with regard to the jurisdictional boundaries infra 3.1.1)

## 2.5 Prominent cases, media coverage

In Germany, there are only few criminal cases related to the responsibility of corporations for violations of human rights. The investigations focused on individual criminal liability and have not resulted in final judgments. For instance, a criminal complaint was filed against two managers of a German engineering company (*Lahmeyer*) that was involved in the construction of a dam in Sudan and was held to bear responsibility for the displacement of 4700 people.<sup>24</sup> The criminal investigations have been terminated in April 2016 because mens rea of the two managers could not be established.<sup>25</sup> In another case, a senior manager of a German timber manufacturer (*Danzer*) was accused of aiding and abetting, through omission, crimes of rape, grievous bodily harm, false imprisonment and arson committed by local security forces of the Democratic Republic of Congo.<sup>26</sup> The public prosecutor's office discontinued proceedings for lack of evidence.<sup>27</sup> In the most recent case, a German company (*KiK*) has been sued by victims of a factory fire in Pakistan where 230 people were killed and 32 were injured. In their compensation claim, the victims argue that the responsibilities of the German company extend to the working conditions in their supplier companies abroad. In August 2016, the district court has accepted jurisdiction and granted legal aid to the claimants to cover their costs. It is the first court trial on responsibility of German companies for human rights violations abroad.<sup>28</sup> In none of these cases, however, the imposition of a corporate fine was at issue. In that regard, the most prominent cases were about

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<sup>24</sup> See Klaus Späne, '„Die-Menschen-hatten-Todesangst“' (*Frankfurter Neue Presse*, 5 December 2015) <http://www.fnp.de/nachrichten/politik/bdquo-Die-Menschen-hatten-Todesangst-ldquo;art673,1736733> > accessed 11 September 2017.

<sup>25</sup> See the documentation of the case provided by the European Centre for Constitutional and Human Rights (ECCHR) <[https://www.ecchr.eu/en/our\\_work/business-and-human-rights/lahmeyer-case.html](https://www.ecchr.eu/en/our_work/business-and-human-rights/lahmeyer-case.html)> accessed 11 September 2017.

<sup>26</sup> Andrea Böhm, 'Der Mord im Dorf' (*ZEIT ONLINE*, 25 April 2013) <<http://www.zeit.de/2013/18/kongo-verbrehen-danzer-verantwortung>> accessed 11 September 2017.

<sup>27</sup> See the documentation of the case provided by the European Centre for Constitutional and Human Rights (ECCHR) <[https://www.ecchr.eu/en/our\\_work/business-and-human-rights/danzer.html](https://www.ecchr.eu/en/our_work/business-and-human-rights/danzer.html)> accessed 11 September 2017.

<sup>28</sup> *Süddeutsche Zeitung* (31 August 2016); see also the information provided by the European Center for Constitutional and Human Rights (ECCHR) <[https://www.ecchr.eu/en/our\\_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html](https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html)> accessed 11 September 2017.

transnational corruption (*Siemens*, 201 million EUR;<sup>29</sup> *MAN*, 151 million EUR<sup>30</sup>) and cartels (e.g. the beer cartel, total fines of 396 million EUR).<sup>31</sup>

The public debate on corporate responsibility for human rights violations is stimulated by NGOs that support the victims (compensation claims, criminal complaints) and highlight the obstacles to an effective enforcement of international human rights standards (e.g. lack of binding standards for monitoring foreign subsidiaries and supplier companies, strict distinction between the responsibility of the mother company and the responsibility of its subsidiaries).<sup>32</sup> To a large extent, the criticism refers to the legal framework for compensation claims, but it has also been criticised that German law does not provide for criminal liability of corporations.<sup>33</sup>

## 2.6 Statistics

There is no data available on corporate fines according to § 30 ROA. An empirical study that analysed the information provided by 74 public prosecutor's offices (of 116 in total) revealed that during 1995–2004 about 75 corporate fines were imposed (per year), with an average amount of 180,000 EUR.<sup>34</sup> A more recent survey in the state of North Rhine-Westphalia (*Nordrhein-Westfalen*) revealed that the majority of public prosecutor's offices (10 out of 19) did not initiate any investigations against corporations during 2006–2011 and that the remaining public prosecutor's offices conducted and terminated proceedings in 27 cases during this period.<sup>35</sup>

## 2.7 Public debate on Corporate Social Responsibility?

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<sup>29</sup> Joachim Herr and Joachim Jahn, 'Siemens akzeptiert Millionenbuße' (*Frankfurter Allgemeine Zeitung*, 8 August 2007) <<http://www.faz.net/aktuell/wirtschaft/recht-steuern/auch-unternehmen-koennen-bestaft-werden-siemens-akzeptiert-millionenbusse-1485778.html>> accessed 11 September 2017.

<sup>30</sup> Rüdiger Köhn, 'MAN zahlt 151 Millionen Euro Geldbuße' (*Frankfurter Allgemeine Zeitung*, 10 December 2009) <<http://www.faz.net/aktuell/wirtschaft/unternehmen/korruptionsaffaere-man-zahlt-151-millionen-euro-geldbusse-1578757.html>> accessed 11 September 2017.

<sup>31</sup> 'Drastische Strafen für das Bierkartell' (*Handelsblatt*, 2 April 2014) <<http://www.handelsblatt.com/unternehmen/handel-konsumgueter/illegale-preisabsprachen-drastische-strafen-fuer-das-bierkartell/9707652.html>> accessed 11 September 2017; see for other cases the annual report 2015 of the Federal Cartel Office (Bundeskartellamt), p. 39 <[http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Jahresbericht/Jahresbericht\\_2015.pdf?\\_\\_blob=publicationFile&v=7](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Jahresbericht/Jahresbericht_2015.pdf?__blob=publicationFile&v=7)> accessed 11 September 2017.

<sup>32</sup> See for instance 'Positionspapier Wirtschaft und Menschenrechte – Erwartungen an einen deutschen Aktionsplan' of April 2015, p. 15–16 <<https://www.misereor.de/fileadmin/publikationen/positionspapier-aktionsplan-wirtschaft-und-menschenrechte-2015.pdf>> accessed 11 September 2017; 'Holding Companies Accountable – Lessons from transnational human rights litigation' of June 2014, p. 16–20 <[https://www.ecchr.eu/en/our\\_work/business-and-human-rights.html](https://www.ecchr.eu/en/our_work/business-and-human-rights.html)> accessed 11 September 2017; Germanwatch, Misereor (ed), 'Bericht 2017: Globale Energiewirtschaft und Menschenrechte – Deutsche Unternehmen und Politik auf dem Prüfstand' <<https://germanwatch.org/de/13958>> accessed 11 September 2017.

<sup>33</sup> Holding Companies Accountable (n 32) 20.

<sup>34</sup> Claudio Kirch-Heim, *Sanktionen gegen Unternehmen* (Duncker & Humblot 2007) 244.

<sup>35</sup> Martin Henssler, Elisa Hoven, Michael Kubiciel and Thomas Weigend, 'Kölner Entwurf eines Verbandssanktionengesetzes' [2018] *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht* 1, 5.

The criticism on the lacking legal framework of corporate criminal liability (supra 2.5) has recently been addressed by the state of North Rhine-Westphalia (*Nordrhein-Westfalen*) that launched a proposal on a code on corporate criminal liability (*Verbandsstrafgesetzbuch*).<sup>36</sup> A similar proposal has been presented most recently by a research group of the University of Cologne (*Kölner Entwurf eines Verbandssanktionengesetzes*).<sup>37</sup> Apart from this initiative, the German government seems not to be willing to adopt binding obligations for German corporations (monitoring supplier companies etc.),<sup>38</sup> but to rely on self-regulatory instruments (e.g. the Partnership for Sustainable Textiles<sup>39</sup>) and soft law instruments (e.g. the application of the OECD guidelines for Multinational Enterprises by the Federal Ministry for economy and energy<sup>40</sup>). In December 2016, the government adopted the National Action Plan to implement the UN Guiding Principles on Business and Human Rights in Germany (*Nationaler Aktionsplan – Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte*).<sup>41</sup> Essentially, the Action Plan still adheres to a self-regulatory approach calling upon the companies to develop adequate human rights due diligence standards and to implement these standards; these standards shall also include reports and grievance mechanisms).<sup>42</sup> With regard to corporate criminal liability, the Action Plan refers to the existing legal framework.<sup>43</sup>

The National Action Plan also refers to Directive 2014/95/EU on corporate social responsibility and disclosure of non-financial information, in particular the corporation's impact on human rights.<sup>44</sup> In April 2017, the Parliament adopted the Act on the implementation of the Directive (*CSR-Richtlinie-Umsetzungsgesetz*).<sup>45</sup> According to the Act, corporations shall be obliged to make a non-financial statement related to environmental matters, social impacts and labour standards, respect for human rights and corruption (§ 289c(2) Commercial Code, *Handelsgesetzbuch* – HGB); the statement shall include risk assessments, the corporation's policy, due diligence processes and their implementation and evaluation (§ 289c(3) Commercial Code). If the company has not developed policies and due diligence processes on the matters mentioned before, it shall provide a reasoned explanation

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<sup>36</sup> <<https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMI16-127.pdf;jsessionid=D0677105F7850D343535E3C085B1663.ifxworker>> accessed 11 September 2017.

<sup>37</sup> Henssler et al, 'Kölner Entwurf eines Verbandssanktionengesetzes' (n 35) 1.

<sup>38</sup> See the critical appraisal of the left opposition party ('DIE LINKE') in the motion of 16 June 2015, Bundestags-Drucksache Nr. 18/5203.

<sup>39</sup> See the information provided by the Federal Ministry for Economic Cooperation and Development <[http://www.bmz.de/en/what\\_we\\_do/issues/textilwirtschaft/deutsches\\_engagement/index.html](http://www.bmz.de/en/what_we_do/issues/textilwirtschaft/deutsches_engagement/index.html)> accessed 11 September 2017.

<sup>40</sup> See the overview provided by Markus Krajewski, Marzieh Bozorgzad and Ronja Heß, 'Menschenrechtliche Pflichten von multinationalen Unternehmen in den OECD-Leitsätzen – Taking Human Rights More Seriously?' [2016] *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 309, 321 ff.

<sup>41</sup> See for further information <<http://www.auswaertiges-amt.de/cae/servlet/contentblob/754690/publicationFile/222786/161221-NAP-DL.pdf>> accessed 11 September 2017.

<sup>42</sup> Nationaler Aktionsplan (n 41) 10 ff.

<sup>43</sup> Nationaler Aktionsplan (n 41) 36.

<sup>44</sup> Nationaler Aktionsplan (n 41) 30.

<sup>45</sup> Statutory Act of 11 April, Federal Law Gazette (*Bundesgesetzblatt*) I p. 802; see also draft of the government, Bundestags-Drucksache 18/9982 of 17 October 2016.

(§ 289c(4) Commercial Code). The criminal provision on incorrect statements applies accordingly (§ 331(1) No. 1 and 2 Commercial Code). Furthermore, the failure to make a statement shall be a regulatory offence. The maximum of the corporate fine shall amount to 10,000,000 EUR or 5 % of the annual turnover of the corporation (§ 334(3a) Commercial Code). Thereby, the government intends to comply with the obligation to provide for effective and dissuasive sanctions.<sup>46</sup> Scholars have raised doubts on whether this obligation applies to the failure to make non-financial statements because monitoring by stakeholders and competitors has proven to be sufficient in other countries (e.g. UK Modern Slavery Act, California Transparency Supply Chain Act).<sup>47</sup>

In contrast to the self-regulatory approach, a recent proposal favours the adoption of a statutory act that defines a due diligence standard binding upon corporations (*Menschenrechtsbezogene Sorgfaltspflichten-Gesetz*).<sup>48</sup> The proposal provides for a general obligation on human rights due diligence (§ 5) and specific obligations related to risk assessment (§ 6), preventive measures (§ 7), remedies (§ 8), organization (§ 9; compliance officer, whistleblower mechanisms), reporting and documentation (§ 11). As these obligations form part of public (administrative) law, the rules on public law enforcement apply (§ 12), and non-compliance can be fined by administrative sanctions (§ 13). Furthermore, the rules on civil liability are modified so that corporations that do not comply with these obligations can be held liable for damages occurred abroad (§ 15).

### **3 Holding Corporations Accountable – the Jurisdictional Issue**

#### **3.1 General Jurisdiction**

##### *3.1.1 General Aspects*

Jurisdiction in criminal matters is subject to the general principles of criminal law: Criminal punishment must be justified by a public interest which is usually based upon the traditional jurisdictional rules (territoriality, active personality etc.); furthermore, the means to pursue the legitimate objective must comply with the principle of proportionality. As a rule, criminal law enforcement in transnational cases is considered legitimate where a genuine link to the German state has been established.<sup>49</sup> Nevertheless, there may be exceptional cases where the exercise of criminal jurisdiction is not legitimate because the genuine link is

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<sup>46</sup> Bundestags-Drucksache 18/9982 of 17 October 2016, 58.

<sup>47</sup> Michael Nietsch and Malwine Munerotto, 'Der Referentenentwurf zur Umsetzung der CSR-Richtlinie', [2016] *Compliance-Berater* 177, 181 f.

<sup>48</sup> Remo Klinger, Markus Krajewski, David Krebs and Constantin Hartmann, 'Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht' (report filed for NGOs, namely amnesty international, Brot für die Welt, Germanwatch and Oxfam) [2016] <<https://germanwatch.org/de/download/14745.pdf>> accessed 11 September 2017, 37 ff.; s. also the proposal of Robert Grabosch and Christian Scheper, 'Die menschenrechtliche Sorgfaltspflicht von Unternehmen – Politische und rechtliche Gestaltungsansätze' (ed Friedrich-Ebert-Stiftung) [2015] <<http://library.fes.de/pdf-files/iez/11623-20150925.pdf>> accessed 11 September 2017, 59 ff.

<sup>49</sup> Martin Böse, 'Vor § 3' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *NK-StGB* (5th edn, Nomos 2017) paras 40–44, with further references.

considered to be too weak (e.g. the passive personality principle)<sup>50</sup> and/or the risk of being punished under German criminal law is not at all foreseeable to the defendant (*nullum crimen sine lege, nullum crimen sine culpa*).<sup>51</sup>

In its decision whether or not to prosecute a crime in Germany, the public prosecutor's office has a wide margin of discretion (§§ 153c, 153f CCP). Interests of the defendant can be taken into account, but do not have considerable weight. For instance, the principle of active personality (§ 7(2) No. 1 CC) is – at least in part – based upon the interest of the defendant to be tried in his home country instead of being surrendered to a foreign state.<sup>52</sup>

Corporate fines are subject to a specific legal framework as the legal basis (§ 30 ROA) forms part of the rules on regulatory offences. This has raised the question of whether corporate liability is subject to the jurisdictional rules for regulatory offences. Unless otherwise provided (e.g. § 378(1)2, § 370(7) Fiscal Code – *Abgabenordnung*),<sup>53</sup> corporate liability is limited to offences committed within German territory, ships and airplanes (§ 5 ROA). According to some scholars, § 5 ROA only applies to administrative offences and, thus, does not cover corporate liability for crimes. Corporate liability for crimes is subject to the rules on the criminal offence that triggers corporate liability (i.e. the crime committed by the corporation's representative).<sup>54</sup> So, criminal liability of both natural and legal persons is subject to the rules on criminal jurisdiction (§§ 3 to 7 CC). As a consequence, a foreign corporation might be held criminally liable for crimes committed by its German representative (active personality).<sup>55</sup> Other scholars argue that this approach ignores the differences between corporations and natural persons and that jurisdictional rules might be well-established for natural persons, but do not fit for corporations (e.g. the rules on vicarious jurisdiction as an alternative to extradition).<sup>56</sup> According to this view, corporate fines are subject to the limitations set out in § 5 ROA.<sup>57</sup> In any case, if corporate liability is triggered by a failure of supervision (*Aufsichtspflichtverletzung*), the corporation is fined for a regulatory offence (§ 130 ROA) and, thus, § 5 ROA applies.<sup>58</sup>

There is no case law on the jurisdictional rules applicable to corporate criminal liability crime, and no discussion on the criteria for the choice of forum in that regard, either. The

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<sup>50</sup> *ibid*, para 42 (passive personality as a general and absolute basis for extraterritorial jurisdiction).

<sup>51</sup> *ibid*, paras 47 f., 49.

<sup>52</sup> *ibid*, para 11.

<sup>53</sup> Extraterritorial jurisdiction can be established expressly or implicitly; in the latter case it is required that the offence is usually committed abroad. Most crimes do not meet this requirement, see with regard to corruption: Christian Caracas, *Verantwortlichkeit in internationalen Konzernstrukturen* (Nomos 2014) 103 ff.

<sup>54</sup> Rogall, '§ 30' (n 2) para 88; Petra Wittig, *Wirtschaftsstrafrecht* (3rd edn, C.H. Beck 2014) § 12 para 11.

<sup>55</sup> *ibid*, para 33.

<sup>56</sup> Anne Schneider, 'Der transnationale Geltungsbereich des deutschen Verbandsstrafrechts – de lege lata und de lege ferenda' [2013] *Zeitschrift für Internationale Strafrechtsdogmatik* 488, 490 f.

<sup>57</sup> Florian Jeßberger, *Der transnationale Geltungsbereich des deutschen Strafrechts* (Mohr 2011) 249; Anne Schneider, 'Der transnationale Geltungsbereich des deutschen Verbandsstrafrechts – de lege lata und de lege ferenda' [2013] *Zeitschrift für Internationale Strafrechtsdogmatik* 488, 491.

<sup>58</sup> Christian Caracas, '§ 130 OWiG – Das lange Schwert der Korruptionsbekämpfung im privaten Sektor' [2015] *Corporate Compliance Zeitschrift* 218.

main question is whether proceedings on sanctioning the corporation should be initiated or not (supra 2.4 on the principle of discretionary prosecution).

### 3.1.2 Territorial Jurisdiction

The principle of territoriality is the primary basis of jurisdiction. It is deeply rooted in the principle of territorial sovereignty and the state's responsibility to enforce the rule of law on its territory; furthermore, the principle of territoriality can be based upon practical considerations because most of the evidence will be available at the place where the crime has been committed.<sup>59</sup>

#### *Legal Framework*

The principle of territorial jurisdiction is implemented in § 3 CC and § 5 ROA. The *locus delicti* is defined in § 9 CC and § 7 ROA; both provisions follow the so-called principle of ubiquity. According to this concept, it is sufficient for territorial jurisdiction if either the criminal conduct or the effect of the crime has occurred within German territory: The crime is committed in every place where the offender acted or, in the case of an omission, should have acted, or where the offence occurred or should have occurred to the intention of the offender (§ 9(1) CC, § 7(1) ROA). In cases of secondary participation (incitement, aiding and abetting) the accessory is subject to German jurisdiction if either the principal offender committed the crime within German territory or if the conduct of the accessory occurred within German territory (§ 9(2)1 CC, § 7(2) ROA).

As has been mentioned above (supra 3.1.1), there is a debate whether the scope of jurisdiction over corporate crimes is determined by § 5 ROA or by §§ 3 to 7 CC. With regard to territorial jurisdiction, however, this question does not matter because the concept of territoriality (§ 3 CC, § 5 ROA) and the definition of the *locus delicti* (§ 9 CC, § 7 ROA) are the same.

As regards corporate crimes, liability for omission (§ 13 CC, § 8 ROA) is particularly relevant as senior managers and other corporate officials are obliged to supervise the corporation's employees and to prevent them from committing crimes.<sup>60</sup> If a failure of proper supervision results in a criminal offence, the manager can be held criminally liable if the offence is related to the corporation and its business activity.<sup>61</sup> The Federal Court of Justice denied a duty to prevent employees from beating another employee during working hours because the crime (assault) did not result from a specific risk related to the company and its business.<sup>62</sup> These rules also apply to business activities abroad if supervision is exercised (or should be exercised) from the corporation's headquarter in Germany.<sup>63</sup> However, it is rather difficult

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<sup>59</sup> Jeßberger, *Der transnationale Geltungsbereich des deutschen Strafrechts* (n 57) 141.

<sup>60</sup> BGHSt (Federal Court of Justice – official court reports) 54, 44, 61; 57, 42, 45.

<sup>61</sup> BGHSt (Federal Court of Justice – official court reports) 57, 42, 46.

<sup>62</sup> BGHSt (Federal Court of Justice – official court reports) 57, 42, 46–47.

<sup>63</sup> Ingeborg Zerbes, 'Globales Wirtschaftshandeln als Gegenstand des Straf- und Strafverfahrensrechts: Eine Bestandsaufnahme' in Florian Jeßberger, Wolfgang Kaleck and Tobias Singelstein (eds), *Wirtschaftsvölkerstrafrecht* (Nomos 2015) 205, 224.

to establish a link between business-related risks and human rights violations committed by company employees (murder, assault, rape).<sup>64</sup>

Furthermore, most crimes require intentional conduct of the offender. Accordingly, the manager will be liable for merely negligent failure of supervision only where criminal liability extends to negligent conduct (e.g. negligent manslaughter, § 222 CC). In this regard, § 130 ROA ensures that any violation of supervisory duties can be sanctioned as regulatory offence. Since the supervisory duties aim at the prevention of corporate crime, it is argued that corporate liability under §§ 130, 30 ROA should be limited to crimes subject to German jurisdiction (§§ 3 ff. CC).<sup>65</sup> On the other hand, accessories acting within German territory are criminally liable for participating in a crime committed abroad even if the crime is not a criminal offence at the place of its commission (§ 9 (2)2 CC). Accordingly, corporate liability for failure of supervision is not considered to be subject to jurisdictional rules for the crimes to be prevented.<sup>66</sup>

Generally speaking, these rules also apply to affiliated groups of companies. In principle, each corporation is autonomous and, thus, criminally liable only for offences committed by its own representatives (*Trennungsprinzip*). Accordingly, the parental company is not per se obliged to supervise its subsidiary company.<sup>67</sup> If, however, the parental company has a dominant influence on the business activities of its subsidiaries, it is considered to be obliged to supervise its subsidiary (§ 130 ROA).<sup>68</sup> The Federal Court of Justice did not decide upon the matter,<sup>69</sup> but prosecutorial practice has confirmed the liability of parental companies in recent corruption cases (*Siemens, MAN*).<sup>70</sup> In competition law, the legislator has recently adopted an explicit legal basis for the liability of the group of corporations acting as an economic entity (§ 81(3a) ARC). If the aforementioned conditions are met (dominant influence, violation of supervisory duties), the parental company can be held liable for crimes committed by its foreign subsidiaries abroad according to §§ 30, 130 ROA.<sup>71</sup>

For example, if the management of a foreign subsidiary is involved in the killing of unionists, the foreign company cannot be prosecuted under German Law because its representatives

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<sup>64</sup> Ingeborg Zerbes, 'Globales Wirtschaftshandeln als Gegenstand des Straf- und Strafverfahrensrechts: Eine Bestandsaufnahme' in Florian Jeßberger, Wolfgang Kaleck and Tobias Singelstein (eds), *Wirtschaftsvölkerstrafrecht* (Nomos 2015) 205, 225 (referring to the *Danzer* case).

<sup>65</sup> Andreas Minkoff, *Sanktionsbewehrte Aufsichtspflichten im internationalen Konzern* (C.F. Müller 2016) 250 ff.

<sup>66</sup> Christian Caracas, "§ 130 OWiG – Das lange Schwert der Korruptionsbekämpfung im privaten Sektor" [2015] *Corporate Compliance Zeitschrift* 218 ff.

<sup>67</sup> Jens Koch, 'Der kartellrechtliche Sanktionsdurchgriff im Unternehmensverbund' [2007] 171 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 554, 574 ff.

<sup>68</sup> Rogall, '§ 30' (n 2) para 27; Bianca Vogt, *Die Verbandsgeldbuße gegen eine herrschende Konzerngesellschaft* (Nomos 2009) 233 ff.

<sup>69</sup> BGH (Federal Court of Justice) *Wirtschaft und Wettbewerb – Entscheidungssammlung* (WuW/E) BGH 1871, 1876.

<sup>70</sup> See the overview provided Andreas Minkoff, *Sanktionsbewehrte Aufsichtspflichten im internationalen Konzern* (C.F. Müller 2016) 145 ff.

<sup>71</sup> Andreas Minkoff, *Sanktionsbewehrte Aufsichtspflichten im internationalen Konzern* (C.F. Müller 2016) 244 ff.

did not act within German territory. Corporate criminal liability of a German parent company requires a dominant influence on the relevant foreign subsidiary. If this condition is met and supervisory duties are established, the scope of these duties is limited to business-related risks. Since the case-law on domestic cases follows a rather narrow understanding of this term (see supra on the beating of employees during working hours), the indirect involvement of the local management in the killing of a unionist will not meet this requirement even if the crime has originated from a conflict between the management of the subsidiary and its employees.<sup>72</sup> It has been suggested to adapt the supervisory duties to the *Ruggie Principles* and, thereby, to extend corporate criminal liability to failure of supervision,<sup>73</sup> but this interpretation is not reflected in court practice yet.

On the other hand, corporate criminal liability can hardly be triggered by failure of supervision if the corporation does not control the business activity of the foreign company that is responsible for human rights violations. Referring to contractual relationships and supply chains might result in boundless and excessive liability.<sup>74</sup> Instead, corporate criminal liability must be subject to the general rules on participation in committing a crime (aiding, abetting, incitement). Accordingly, criminal liability is not established by merely causing or contributing to adverse human rights impacts (see principle 17 on human rights due diligence), but usually requires intentional conduct. As far as criminal liability covers negligent conduct (negligent manslaughter or causing bodily harm by negligence, §§ 222, 229 CC), the applicable standard has not yet been developed in criminal law. Again, it has been suggested to adapt the standards established by soft law such as the *Ruggie Principles*.<sup>75</sup> On the other hand, it follows from the maxim *nullum crimen sine lege certa* that the due diligence standard should be clearly defined by the law (see for corresponding reform proposals supra 2.7).<sup>76</sup>

A case related to the supervision of supply chains is actually tried before a civil court in Germany (supra 2.5). According to the legal doctrine and existing case-law on torts,

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<sup>72</sup> See with regard to the *„Danzer-case“*: Ingeborg Zerbes, ‘Globales Wirtschaftshandeln als Gegenstand des Straf- und Strafverfahrensrechts: Eine Bestandsaufnahme’ in Florian Jeßberger, Wolfgang Kaleck and Tobias Singelstein (eds), *Wirtschaftsvölkerstrafrecht* (Nomos 2015) 205, 225.

<sup>73</sup> Patrick Kroker, ‘Menschenrechte in der Compliance’ [2015] *Corporate Compliance Zeitschrift* 120, 126; Miriam Saage-Maaß, ‘Ahndung wirtschaftsverstärkter Kriminalität’ [2014] *Neue Kriminalpolitik* 228, 237-238.

<sup>74</sup> See the general concerns raised by Martin Heger, ‘Societas delinquere non potest? Unternehmen als Adressat staatlicher Strafsanktionen in Deutschland’, [2017] *Jahrbuch für öffentliches Recht* 213, 235; Birgit Spießhofer, ‘Die neue europäische Richtlinie über Offenlegung nichtfinanzieller Informationen – Paradigmenwechsel oder Papiertiger?’ [2014] *Neue Zeitschrift für Gesellschaftsrecht* 1281, 1287.

<sup>75</sup> Miriam Saage-Maaß, ‘Ahndung wirtschaftsverstärkter Kriminalität’ [2014] *Neue Kriminalpolitik* 228, 236; Ingeborg Zerbes, ‘Globales Wirtschaftshandeln als Gegenstand des Straf- und Strafverfahrensrechts: Eine Bestandsaufnahme’ in Florian Jeßberger, Wolfgang Kaleck and Tobias Singelstein (eds), *Wirtschaftsvölkerstrafrecht* (Nomos 2015) 205, 226.

<sup>76</sup> See with regard to public law Marian Paschke, ‘Extraterritoriale Sorgfaltspflichten von Außenwirtschaftsunternehmen zur Achtung von Menschenrechten ante portas?’ [2016] *Recht der Transportwirtschaft (RdTW)* 121, 125.

however, German companies are not considered to be obliged to ensure that foreign suppliers comply with human rights standards.<sup>77</sup>

### *Practice: (High Court) Jurisprudence*

The case-law is based upon the principle of ubiquity (§ 9 CC). In that regard, the effects doctrine might result in a rather extensive concept of territoriality. This has been highlighted in the *Töben*-case where an Australian citizen was convicted of incitement to hatred because he had denied the genocide of the Jews committed by the National Socialists. Even though the offender operated his internet site in Australia, German courts applied domestic criminal law because the criminal conduct was considered to be capable of disturbing public peace in Germany.<sup>78</sup> The *Töben*-case is a borderline-case for the effects principle: Since this principle is derived from the principle of ubiquity and designed to determine the *locus delicti*, it does not apply to any domestic effect, but requires an effect which forms an essential element of the relevant criminal offence. In the eyes of the German federal Court of Justice, the *Töben*-case met this requirement as the criminal offence required the potential effect of disturbing public peace in Germany. By contrast, conduct crimes do not fall within the scope of the effects doctrine even if the rationale of the criminal offence is to prevent the effects of the prohibited conduct for public peace. As a consequence, the Federal Court of Justice stated in 2014 that the public use of Nazi-symbols in a foreign state does not fall within German jurisdiction even if the perpetrator has used the incriminated symbol on a web page that is accessible from Germany.<sup>79</sup> This judgment illustrates that the scope of territorial jurisdiction must be examined case-by-case, or more precisely: offence by offence.

#### *3.1.3 Extraterritorial Jurisdiction*

In German criminal law, there is no presumption against extraterritorial jurisdiction. However, the rules referring to any other genuine link (protection of state interests, active personality etc.) only apply to crimes that have been committed abroad (§§ 5 to 7 CC).

#### *Active Personality (or Nationality) Principle*

##### – General Aspects

According to the prevailing (traditional) understanding, the principle is based upon the special bond of loyalty between the state and its citizens.<sup>80</sup> This argument applies in particular to crimes against the state.<sup>81</sup> According to another reasoning, the principle is linked to the ban on extradition of one's own nationals; providing for a basis for prosecuting and adjudicating perpetrators that cannot be extradited, this reasoning comes very close to

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<sup>77</sup> Marc-Philippe Weller, Luca Kaller and Alix Schulz, 'Haftung deutscher Unternehmen für Menschenrechtsverletzungen im Ausland' [2016] 226 Archiv für die civilistische Praxis (AcP) 387, 401-402.

<sup>78</sup> BGH (Federal Court of Justice) [2001] Neue Juristische Wochenschrift 624.

<sup>79</sup> BGH (Federal Court of Justice) [2015] Neue Zeitschrift für Strafrecht 81.

<sup>80</sup> Martin Böse, 'Vor § 3' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *NK-StGB* (5th edn, Nomos 2017) para 18; Florian Jeßberger, *Der transnationale Geltungsbereich des deutschen Strafrechts* (Mohr Siebeck 2011) 242-243.

<sup>81</sup> Martin Böse, *ibid*; Meyer, 'Country Report "Germany"' (n 9) 150.

the vicarious jurisdiction,<sup>82</sup> but is also based upon considerations relating to the interests of the defendant.<sup>83</sup>

– Corporations and the Active Personality Principle

As has been mentioned above (supra 3.1.1), the scope of jurisdiction over corporate crimes is a controversial issue. According to some scholars, corporate liability is triggered by any offence committed by its representatives if he/she is subject to criminal jurisdiction according to §§ 3 to 7 CC. As a consequence, jurisdiction over a corporation is triggered by a criminal offence committed by a representative with German citizenship (supra 3.1.1). According to others, jurisdiction over corporate crime is subject to strict territoriality (§ 5 ROA), and the active personality principle does not apply.

In any case, there is no provision corresponding to the implementation of the active personality principle as a basis for jurisdiction over individuals (§§ 5, 7(2) No. 1 CC) that refers to the nationality (seat, registration in Germany etc.) of corporations. According to the proposal on a code on corporate criminal liability (*Verbandsstrafgesetzbuch*), the rules on criminal jurisdiction shall apply to corporate criminal liability (§ 3(1) CCCL-draft).<sup>84</sup> As a consequence, jurisdiction can be based upon the nationality of the corporation.<sup>85</sup> The proposal seems to link the nationality of a corporation to its seat (§ 2(3) CCCL-draft).<sup>86</sup> Since the application of this criterion might result in a discrimination of corporations registered abroad, but transferring their seat to Germany (and thereby, subjecting themselves to German jurisdiction), it is argued that the corporation's nationality should be determined by the place of its registration.<sup>87</sup>

*Passive Personality Principle*

– General Aspects

In Germany, the passive personality principle is implemented in § 5 and § 7(1) CC.

According to § 7(1) CC, German criminal law applies to any criminal offence against a German national if the relevant conduct is a criminal offence under the law of the state where

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<sup>82</sup> Böse, *ibid*; Meyer, *ibid*.

<sup>83</sup> Florian Jeßberger, *Der transnationale Geltungsbereich des deutschen Strafrechts* (Mohr Siebeck 2011) 244.

<sup>84</sup> Explanatory memorandum, 49 <https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMI16-127.pdf;jsessionid=D0677105F78500D343535E3C085B1663.ifxworker> accessed 11 September 2017.

<sup>85</sup> Anne Schneider, 'Der transnationale Geltungsbereich des deutschen Verbandsstrafrechts – de lege lata und de lege ferenda' [2013] *Zeitschrift für Internationale Strafrechtsdogmatik* 488, 494.

<sup>86</sup> See also explanatory memorandum, 48 <https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMI16-127.pdf;jsessionid=D0677105F78500D343535E3C085B1663.ifxworker> accessed 11 September 2017. The jurisdictional rules of the code proposed by a research group of the university of Cologne explicitly provide for such a link (§ 2 No. 3), see Henssler et al, 'Kölner Entwurf eines Verbandsstrafgesetzbuchs' (n 35) 2.

<sup>87</sup> Anne Schneider, 'Der transnationale Geltungsbereich des deutschen Verbandsstrafrechts – de lege lata und de lege ferenda' [2013] *Zeitschrift für Internationale Strafrechtsdogmatik* 488, 494–495, referring to Case C-167/01 *Inspire Art* [2003] ECR I-10155.

the crime has been committed (*lex loci*). Thus, jurisdiction is subject to the double criminality requirement.

By contrast, § 5 establishes jurisdiction over the offences listed in that provision regardless of the *lex loci*. There are, however, only few offences where jurisdiction is exclusively based upon the passive personality principle (political persecution, §§ 234a, 241a CC; abduction of minors, § 235 CC; forced marriage, § 237; female genital mutilation, § 226a).

The limited role of the passive personality principle reflects the understanding that it is considered a fairly weak basis for establishing jurisdiction to prescribe.<sup>88</sup> Correspondingly, the general rule in § 7(1) has not raised similar concerns as it is subject to the double criminality requirement, thereby taking into account the sovereignty of the state where the crime has been committed and the interests of the offender who can rely on the *lex loci*.<sup>89</sup> On the other hand, the protection of German nationals must be considered legitimate where the offender seeks to circumvent prohibitions under German criminal law by travelling abroad (e.g. forced marriage or female genital mutilation).<sup>90</sup>

– Corporations and the passive personality principle

The scope of jurisdiction over corporate crime is an open question (supra 3.1.1). According to some scholars, jurisdiction over corporate crime is established if the criminal offence committed by its representative is subject to German jurisdiction; so, jurisdiction over corporations can be (indirectly) triggered by the passive personality principle (§ 5, § 7(1) CC). According to others, corporate liability for crimes is subject to territorial jurisdiction only (§ 5 ROA). The proposal on a code for corporate sanctions presented by a research group of the university of Cologne explicitly provides for extraterritorial jurisdiction based upon the passive personality principle (§ 2 No. 4 CCS-draft).<sup>91</sup>

A different question is whether crimes committed against German corporations are subject to jurisdiction on the basis of passive personality. According to the prevailing opinion, the passive personality principle does not apply to legal persons because this is considered to be incompatible with the wording (*‘gegen einen Deutschen’* – ‘against a German’).<sup>92</sup> On the other hand, the attribute ‘German’ is not exclusively used for natural persons, but also applied to legal persons or even objects (e.g. German ships, see § 4 CC); accordingly, some authors have taken the view that the personality principle applies to a corporation that has

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<sup>88</sup> Kai Ambos, ‘Vor § 3’ in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum StGB* (3rd edn, C.H. Beck 2017) paras 38 ff.; Meyer, ‘Country Report “Germany”’ (n 9) 156.

<sup>89</sup> Martin Böse, ‘Vor § 3’ in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *NK-StGB* (5th edn, Nomos 2017) para 20, 48–49.

<sup>90</sup> Kai Ambos, ‘§ 5’ in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum StGB* (3rd edn, C.H. Beck 2017) para 31; Martin Böse, ‘§ 5’ in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *NK-StGB* (5th edn, Nomos 2017) para 27.

<sup>91</sup> Henssler et al, ‘Kölner Entwurf eines Verbandssanktionengesetzes’ (n 35) 2.

<sup>92</sup> Oberlandesgericht (Higher Regional Court) Stuttgart [2004] *Neue Zeitschrift für Strafrecht* 402, 403; Kammergericht (Higher Regional Court) Berlin [2006] *Neue Juristische Wochenschrift* 3016, 3017; Kai Ambos, ‘§ 7’ in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum StGB* (3rd edn, C.H. Beck 2017) para 23.

its seat within Germany.<sup>93</sup> This approach has also been taken in the draft code for corporate sanctions of the university of Cologne (§ 2 No. 4 CCS-draft).<sup>94</sup>

### *Protective Principle*

#### – General Aspects

In Germany, the protective principle is implemented in § 5 CC. Since its scope of application is limited to crimes committed abroad (supra 3.1.3), there is an implicit primacy of the territoriality principle.

According to § 5 CC, the protective principle applies to the preparation of a war of aggression (§ 80 CC), high treason (§§ 81 to 83 CC), crimes endangering the democratic state and the rules of law (§§ 89, 90, 90a, 90b CC), treason and crimes against national security (§§ 94 to 100a) and crimes against the national defence (§§ 109, 109a, 109d, 109e, 109g, 109h). Furthermore, the protective principle applies to crimes against the judiciary (false testimony, perjury etc., §§ 153 to 156), crimes committed by and against German officials, corruption of German officials (§§ 331 to 337) and members of Parliament (§ 108e). Terrorism is subject to special jurisdictional rules (§ 89a(3) and (4), § 129b(1) and (2) CC), combining the protective principle with the active and passive personality principle.

According to the German understanding of the protective principle, it also covers financial and economic interests of the German state. Therefore, German criminal law applies to the following crimes even if committed abroad: violation of business or trade secrets of domestic companies (§ 5 No. 7), environmental crimes committed within Germany's exclusive economic zone (§ 5 No. 11a), counterfeiting money (§ 6 No. 7), subsidy fraud (§ 6 No. 8) and tax evasion (§ 370(7) Fiscal Code).

Applied by foreign states, the concept of crimes against the state can be abused to persecute political opponents. However, this abuse usually is not linked to extraterritorial jurisdiction, but directed against the domestic population of the prosecuting state. In general, the traditional rules on extradition (double criminality requirement, exceptions for political offences) provide a sufficient level of protection for German citizens and other residents.

#### – Corporations and the passive protective principle

In Germany, extraterritorial measures targeting corporations under the regime of secondary boycotts (such as the *U.S. Helms-Burton Act*) are considered to violate international law because they are not based upon a genuine link.<sup>95</sup> Thus, Germany has adopted no such measures.

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<sup>93</sup> Martin Böse, '§ 7' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *NK-StGB* (5th edn, Nomos 2017) para 4, with further references.

<sup>94</sup> Henssler et al, 'Kölner Entwurf eines Verbandssanktionengesetzes' (n 35) 2.

<sup>95</sup> Landgericht (District Court) Dortmund, Judgment of 15 January 2016 – Case 3 O 610/15, [2016] *Gesellschafts- und Wirtschaftsrecht* 211; see also Council Regulation (EC) 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country [1996] OJ L309/1.

### *Jurisdiction over military personnel and/or private military contractors*

According to § 1a(2) Military Criminal Law Act (*Wehrstrafgesetz*), German criminal law applies to any crime committed by German soldiers during their official stay abroad or in connection with their official duties. German nationals can be held responsible for committing or participating in military offences committed abroad (§ 1a(2) No. 2 MCLA).

Jurisdiction over private contractors might be based upon the general rule on German public officials (*Amtsträger*) and persons entrusted with special public service functions (§ 5 No. 12 and 13 CC). The notion of public official explicitly covers private employees performing public administrative services (§ 11(1) No. 2 lit. c CC). Nevertheless, the German constitution (Art. 87a, Art. 33(4) Basic Law) prohibits the state from outsourcing the exercise of military functions and powers (i.e. the use of force against individuals) to private corporations.<sup>96</sup>

### *Vicarious Jurisdiction – Stellvertretende Strafrechtspflege*

In German criminal law, vicarious jurisdiction is foreseen as an alternative to extradition (§ 7(2) No. 2 CC). Vicarious jurisdiction is subject to the following requirements:

First, the relevant act is punishable at the place where the crime has been committed; if the place of commission is not subject to any criminal jurisdiction the double criminality requirement applies to the state claiming jurisdiction based on another genuine link (e.g. active personality). Vicarious jurisdiction, however, may even be exercised if the crime cannot be prosecuted under the law of the foreign state claiming jurisdiction (e.g. statute of limitations, double jeopardy).<sup>97</sup>

Second, the offender (suspect) stays within German territory, but cannot or must not be extradited. However, a request for extradition and/or prosecution is not required.<sup>98</sup>

As regards corporations, the principle of vicarious jurisdiction does not apply (supra 3.1.1).

### *3.1.4 Universal jurisdiction*

The principle of universal jurisdiction is implemented in § 6 CC and § 1 of the Code on core crimes of international law (*Völkerstrafgesetzbuch*). According to these provisions, universal jurisdiction applies to genocide, crimes against humanity and war crimes (§ 1 CCCIL) and terrorism (offences involving nuclear energy, explosives and radiation, and attacks on air and maritime traffic), human trafficking, drug dealing, pornography and counterfeiting money (§ 6 CC). Furthermore, German criminal law applies to any crime which, on the basis

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<sup>96</sup> Daniel Heck, *Grenzen der Privatisierung militärischer Aufgaben* (Nomos 2010) 111–137.

<sup>97</sup> BGH (Federal Court of Justice) [2011] *Neue Zeitschrift für Strafrecht – Rechtsprechungs-Report* 245, 246; for the contrary view see Kai Ambos, ‘§ 7’ in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum StGB* (3rd edn, C.H. Beck 2017) para 27; Martin Böse, ‘§ 7’ in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *NK-StGB* (5th edn, Nomos 2017) para 15.

<sup>98</sup> Martin Böse, *ibid*; for the contrary view see Kai Ambos, ‘§ 7’ in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum StGB* (3rd edn, C.H. Beck 2017) para 29.

of an international agreement binding on the Federal Republic of Germany, must be prosecuted even though committed abroad (§ 6 No. 9 CC).

There are only few cases where the principle of universality has been applied in court; the relevant cases are related to core crimes of international law, piracy, and drug dealing.

The exercise of universal jurisdiction over core crimes of international law (§ 1 CCCIL) does not require the presence of the alleged offender.<sup>99</sup> However, the absence of the defendant provides a ground to terminate proceedings (§ 153 f(1)1 and (2) 1 No. 3 CCP) as the trial must not be held in absentia. In contrast, jurisdiction based upon § 6 CC is dependant upon a link to the German criminal justice system that is usually established by the presence of the defendant.<sup>100</sup> In recent case-law, however, the Federal Court of Justice has abandoned this requirement for cases of international drug trafficking (§ 6 No. 5 CC).<sup>101</sup>

The question whether or not the principle of universality applies to corporations depends upon whether jurisdiction over corporate crimes is determined by the jurisdiction over the individual offender (i.e. jurisdiction is established by § 6 CC) or strictly limited to territorial jurisdiction (§ 5 ROA, see supra 3.1.1).

### 3.1.5 Other sources of jurisdiction

As an emanation of the duty to loyal cooperation with the European Union (Art. 4(3) TEU), the protective principle applies accordingly to the protection of the Union's legal interests (e.g. the financial interests). This principle is the so-called 'EU protective principle' (*Unionsschutzprinzip*).<sup>102</sup>

The effects doctrine is inherent part of the territoriality principle; as has been illustrated above (supra 3.1.2), its application might extend criminal jurisdiction to a considerable extent. Nevertheless, there has not come up any case where the effects doctrine was applied in order to subject foreign corporations to German criminal law.

In competition law (anti-trust law), offences are subject to administrative fines only. Here, the effects principle is the main basis for jurisdiction because individuals and corporations may only be fined for restraints of competition having an effect within German territory (§ 185(2) Act against restraints of competition – *Gesetz gegen Wettbewerbsbeschränkungen*). Thus, a corporate fine must not be imposed for illegal conduct affecting foreign markets only.

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<sup>99</sup> Kai Ambos, '§ 6' in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum StGB* (3rd edn, C.H. Beck 2017) para 4.

<sup>100</sup> Kai Ambos, '§ 6' in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum StGB* (3rd edn, C.H. Beck 2017) para 4; Martin Böse, '§ 6' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *NK-StGB* (5th edn, Nomos 2017) para 8.

<sup>101</sup> BGH (Federal Court of Justice) [2017] *Neue Juristische Wochenschrift* 1043, 1044, with further references.

<sup>102</sup> Kai Ambos, 'Vor § 3' in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar zum StGB* (3rd edn, C.H. Beck 2017) para 37; Martin Böse, 'Vor § 3' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *NK-StGB* (5th edn, Nomos 2017) para 32; Florian Jeßberger, *Der transnationale Geltungsbereich des deutschen Strafrechts* (Mohr 2011) 258.

### 3.1.6 Transitional justice mechanisms

Under German law, there are no special rules on extraterritorial jurisdiction for special justice mechanisms (e.g., truth and reconciliation commissions), but such mechanisms can be taken into consideration in the prosecutor's decision whether to investigate a case or not.

## 3.2 Jurisdiction for Prosecuting Corporations under International Law (UN Law, multi-lateral treaties)

### 3.2.1 General Aspects

In the German criminal justice system, jurisdiction must be based upon statutory law (*nullum crimen sine lege*); it cannot be based upon international law or customary law alone. Most obligations arising from international law have been explicitly implemented in § 1 of the Code on core crimes of international law and § 6 CC (see supra 3.1.4). Furthermore, there is a 'catch-all' clause in § 6 No. 9 CC for international obligations to prosecute a crime committed abroad (in particular from the obligation *aut dedere aut judicare*).<sup>103</sup> The scope of this clause, however, is limited to obligations under international treaties and does not cover customary law.

On the other hand, the exercise of (universal) jurisdiction must comply with international law and customary law, the principle of non-intervention in particular. As universal jurisdiction cannot be based upon a genuine link (territoriality, active personality etc.), it must be based upon an international treaty or customary law defining the respective crime and reflecting a consensus that the corresponding act must be punished.<sup>104</sup> Otherwise, the exercise of universal jurisdiction would violate the sovereignty of the state where the conduct (the 'crime') took place. Furthermore, international law does not impose an absolute obligation to prosecute and to punish, but still leaves a margin of discretion to the states on how to exercise their *ius puniendi* (see e.g. the Dutch drug policy). If this margin of discretion is exercised in conformity with the international obligations, there is no legitimate basis for other states to exercise universal jurisdiction (subsidiarity of universal jurisdiction).<sup>105</sup>

### 3.2.2 Jurisdictions prescribed by International Humanitarian Law – Core Crimes

The jurisdiction requirements of international treaties have been implemented in § 6 CC, in particular in § 6 No. 9 CC (supra 3.2.1).

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<sup>103</sup> Martin Böse, '§ 6' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *NK-StGB* (5th edn, Nomos 2017) paras 17, 20.

<sup>104</sup> Martin Böse, '§ 6' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *NK-StGB* (5th edn, Nomos 2017) paras 3, 5; see also BGH (Federal Court of Justice), Decision of 16 December 2015 – 1 Ars 10/16 [juris] para 22.

<sup>105</sup> Claus Kreß, 'Völkerstrafrecht in Deutschland' [2000] *Neue Zeitschrift für Strafrecht* 617, 625–626.

### 3.2.3 Jurisdiction based on Customary International Law

In the German criminal justice system, criminal jurisdiction based on customary law would be in breach with the principle *nullum crimen sine lege* (Art. 103(2) Basic Law – *Grundgesetz*).<sup>106</sup> Thus, jurisdiction can only be based upon statutory law (see supra 3.2.1.).

## 4 Overlapping Domestic Legal Frameworks and the Prosecution of Corporations

### 4.1 Conflicts of jurisdiction

Given the fact that jurisdiction over corporations can only be exercised on the basis of the territoriality principle, the German criminal justice system appears to be rather reluctant in claiming jurisdiction in cross-border cases. Correspondingly, negative conflicts of jurisdiction seem to be more likely than positive conflicts. Nevertheless, German corporations have been fined in cases with a cross-border dimension, in particular transnational corruption cases (e.g. *Siemens*, see supra 2.5).

### 4.2 Overlapping Domestic jurisdictions

As corporate fines are imposed under the law of regulatory offences and administrative fines, there is no overlap with administrative sanctions. Corporations however can be subject to civil liability under the law of torts (§§ 823, 831 Civil Code – *Bürgerliches Gesetzbuch*). Furthermore, German corporations can be sued for damages incurred abroad. Most recently, a German company (*KiK*) has been sued by victims of a factory fire in Pakistan where 230 people were killed and 32 were injured. In the compensation claim, the victims argue that the responsibilities of the German company extend to the working conditions in their supplier companies abroad (see supra 2.5).<sup>107</sup> Civil liability under the German law of torts, however, meets several obstacles: As a rule, German torts law is not applicable if the damage occurred in another country (Art. 4(1) Regulation (EU) 864/2007 – Rome II).<sup>108</sup> Some authors, however, argue that German law is applicable because human rights due diligence standards are mandatory provisions and, thus, override the *lex delicti commissi* (Art. 16 Regulation (EU) 864/2007).<sup>109</sup> Even if German law is applicable, traditional legal doctrine and existing case-law on torts do not support the view that German companies are obliged to ensure that foreign suppliers comply with human rights standards.<sup>110</sup>

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<sup>106</sup> See for the core crimes of international law Helmut Satzger, *Internationales und Europäisches Strafrecht* (7th edition, Nomos 2017) § 17 para 12.

<sup>107</sup> *Süddeutsche Zeitung* (31 August 2016); see also the information provided by the European Center for Constitutional and Human Rights (ECCHR) <[https://www.ecchr.eu/en/our\\_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html](https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html)> accessed 11 September 2017.

<sup>108</sup> Marc-Philippe Weller, Luca Kaller and Alix Schulz, 'Haftung deutscher Unternehmen für Menschenrechtsverletzungen im Ausland' [2016] 226 *Archiv für die civilistische Praxis (AcP)* 387, 393 ff.

<sup>109</sup> Miriam Saage-Maaß and Maren Leifker, 'Haftungsrisiken deutscher Unternehmen und ihres Managements für Menschenrechtsverletzungen im Ausland' [2015] *Betriebs-Berater* 2499, 2502.

<sup>110</sup> Marc-Philippe Weller, Luca Kaller and Alix Schulz, 'Haftung deutscher Unternehmen für Menschenrechtsverletzungen im Ausland' [2016] 226 *Archiv für die civilistische Praxis (AcP)* 387, 401 f., 404 f.

### 4.3 Conflicting International jurisdictions

In Germany, there is neither a general mechanism nor case-law on conflicts of jurisdictions relating to corporate criminal liability because the number of cases is relatively small and, so, these problems have not been relevant yet. Corporate fines, however, play a major role in the enforcement of EU competition law. In this regard, the European Competition Network has been established in order to settle vertical (Commission – national competition authority) and horizontal (two or more national competition authorities) conflicts of jurisdiction.<sup>111</sup>

## 5 Proposals for Reform of the Legal Framework of Jurisdiction

There is no discussion on the reform of the legal framework of criminal jurisdiction, but jurisdictional issues are occasionally discussed in the context of recent criminal law reforms. A recent example is the new legislation on corruption and the implementation of the corresponding conventions of the Council of Europe and the United Nations. The new provisions extend the scope of corruption offences (§§ 332, 334 CC) to officials of foreign states (§ 335a CC).<sup>112</sup> This amendment is – at least in part – driven by the intention to contribute to the rule of law in the corresponding state.<sup>113</sup> On the other hand, the new law has been criticised as a violation of the sovereignty of the foreign state because it is up to this state to decide upon whether and to what extent corruption of its officials should be subject to criminal punishment.<sup>114</sup> The debate mirrors an increasing concern for human rights violations abroad and a tendency to establish extraterritorial jurisdiction to that end, but also the need to respect state sovereignty and the jurisdictional rules of international law.

## 6 Conclusion

Corporate criminal liability for human rights violations that have been committed abroad meets several obstacles in Germany. First and foremost, German law does not provide for corporate criminal liability in the strict sense, but only for administrative fines as corporate sanctions (supra 1 and 2.1). This regulatory framework has two important consequences: On the one hand, the connotation of less serious misconduct (regulatory offences) and the principle of discretionary prosecution favours a sanctioning practice that focuses on the individual rather than the corporate offender (supra 2.1.2). On the other hand, territorial jurisdiction is the main jurisdictional basis for imposing corporate fines, and it has not been established yet whether and to what extent the rules on extraterritorial jurisdiction over criminal offences committed by natural persons apply to corporations, too (supra 3.1.1).

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<sup>111</sup> Joint Statement No 15435/02 of the Council and the Commission of 10 December 2002 on the functioning of the network of competition authorities, Council Document 15435/02 ADD 1; Commission Notice on cooperation within the network of competition authorities, O.J. 2004 No C 101/43..

<sup>112</sup> Act on Combating Corruption (Gesetz zur Bekämpfung der Korruption) of 20 November 2015, Federal Law Gazette (Bundesgesetzblatt) II p. 2025.

<sup>113</sup> Bundestags-Drucksache No. 18/4350, p. 24; Heiko Maas, 'Wann darf der Staat strafen?' [2015] *Neue Zeitschrift für Strafrecht* 305, 307 f.

<sup>114</sup> Bernd Schünemann, 'Der Gesetzentwurf zur Bekämpfung der Korruption - überflüssige Etappe auf dem Niedergang der Strafrechtskultur' [2015] *Zeitschrift für Rechtspolitik* 68, 71.

The second obstacle is the lack of clear legal standards on supervisory duties of corporations to prevent human rights abuses by their subsidiaries and suppliers abroad (supra 3.1.2). It has been suggested to incorporate the *Ruggie Principles* into German criminal law by an extensive interpretation of the general rules on omission and complicity, but this approach raises serious concerns as rules establishing criminal liability should be clear and precise so that the risk of criminal punishment is foreseeable for the potential offender (*nullum crimen, nulla poena sine lege certa*). Furthermore, it is up to the legislator to define the requirements of criminal liability for human rights abuses, and the current legislation clearly favours a soft-law-approach that leaves it to the corporations to develop and implement human rights due diligence processes (supra 2.7).

For these reasons, it seems doubtful whether the current legal framework could effectively contribute to holding corporations accountable for human rights abuses. To that end, the German legislator will not have to introduce corporate criminal liability (see, however, the corresponding reform proposal, supra 2.7),<sup>115</sup> but to establish legally binding standards (supervisory duties, due diligence) on the basis of which corporations can be held liable for human rights violations (for corresponding reform proposals see supra 2.7). The German legislator has undertaken significant efforts to strengthen the sanctioning system for infringements of EU competition law (see with regard to the liability of subsidiaries 3.1.2); it is beyond doubt that the prosecution of human rights abuses is no less important and, thus, should be enhanced by an adequate legal framework.

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# ITALIAN REPORT ON PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW

By Gabriella Di Paolo\* \*\*

## 1 General Framework for Prosecuting Corporations for Violations of International Criminal Law

### 1.1 Substantive law establishing liability of corporations for crimes committed in their interest or to their benefit

In 2001, in order to comply with obligations arising from international conventions and European Union law, Italy introduced into its legal system direct liability of legal persons for crimes committed in their interest or to their benefit by representatives (employees or high-level personnel). The formal term used is 'corporate administrative responsibility from a criminal offense' (henceforth CAR).

The new legal regime (contained in Legislative Decree 8 June 2001, no. 231, henceforth L.D. 231/2001) was a great innovation and marked the end of the principle (based on the Roman law tradition) of '*societas delinquere non potest*', which had sustained the Italian criminal justice system for centuries.

L.D. 231/2001 created an independent system of law enforcement. The new law first of all determines the criteria for attributing (administrative) liability to the corporation (arts 5, 6, 7 and 8), types of crimes that can trigger the liability of the legal entity (arts 24- 25 duodecies) and applicable sanctions (arts 9-23.). It also outlines the procedural framework for assessing corporate responsibility (arts 34-73), which is based on the Code of Criminal Procedure.

Indeed, despite moving (at least nominally) towards a hypothesis of corporate administrative liability, Italian lawmakers decided to leave the assessment of corporate offences and the application of relative sanctions in the hands of criminal justice. So, it was ruled that the administrative sanctions against the corporation should be applied by the criminal judge with the jurisdiction to ascertain the crime committed by the physical person. The law also provided that not only the set of rules contained in L.D. 231/2001, but also the provisions of the Code of Criminal Procedure, should be applied in the proceeding for ascertaining corporate liability.

Under article 1, the new law applies to 'corporations that have legal personality and also to companies and associations regardless of whether they have legal personality'; it does not, however, apply 'to the State, local authorities, non-economic public bodies and bodies that carry out constitutional functions'. The list of recipients that might be considered liable

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\*\* Rider to footnote no 57: After the drafting of this paper, the Italian Parliament adopted Law No 110/2017 of 14/07/2017. This law added a new provision (art 613-bis c.p.) to the criminal code. Under art 613-bis c.p. torture is considered as an independent type of crime.

(which henceforth, for the sake of brevity, will be referred to only as 'corporations', 'companies' or 'legal persons') is very long: it includes private legal persons, all companies (whether limited-companies or partnerships), associations (whether recognised or not), economic public authorities, as well as foundations, committees, non-profit organisations, professional associations, mutual funds and pension funds.

### 1.1.1 Nature of Liability

With regard to the type of corporate liability (criminal, administrative or other) and the criteria for attributing it, international law left wide discretion to contracting Parties.

Regarding the first issue, Italian lawmakers chose not to refer to 'criminal liability' (*responsabilità penale*), but preferred (perhaps out of political prudence) the expressions 'administrative liability' (*responsabilità amministrativa*: see art 2 of L.D. 231/2001) and 'administrative offence' (*illecito amministrativo*: see arts 1 and 34 of L.D. 231/2001).

Despite this tendency to label as 'administrative' a liability that is clearly of a punitive nature, both the legal literature and the case law raised the question of the true nature of corporate liability (is it criminal, or administrative, or does it embody a third model of liability?).

There is no agreement on this issue among scholars.<sup>1</sup> According to a less prevalent thesis, it is an administrative type of liability, because that is how it was determined by lawmakers.

In another interpretation, the nature of the liability is basically criminal. There are many arguments supporting this approach: the fact that corporate liability arises only if a crime has been committed; the independence of the corporation's liability from the perpetrator's; the jurisdiction of the criminal courts, etc.

There is also an intermediate position (which at the moment is certainly the most prevalent) that considers it a *tertium genus*. Based on the Government Report on L.D. 231/2001, it is a 'hybrid' between the two forms of liability, which combines the essential features of the criminal system and the administrative one.

Even the case law mentions both interpretations. However, a recent ruling of the Joint Chambers of the Criminal Section of the Court of Cassation, in the *TyssenKrupp AST S.p.a* case, endorsed the *tertium genus* thesis.<sup>2</sup>

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<sup>1</sup> For a summary of the various theories, see E Dolcini, G Marinucci, *Manuale di diritto penale*. Parte generale, 5° edizione (Milan, Giuffrè, 2015) 759.

<sup>2</sup> Cass. Penale, Sez. Unite, 24 April 2014 (deposited 18 September 2014), *Espenhahn, ThyssenKrupp Acciai Speciali Terni S.p.a*, n. 38343, in CED Cass., n. 261112. The full text of the ruling is also available at <[http://www.penalecontemporaneo.it/area/3-/-/3292caso\\_thyssenkrupp\\_depositate\\_le\\_motivazioni\\_della\\_senenza\\_delle\\_sezioni\\_unite\\_sulla\\_distinzione\\_tra\\_dolo\\_eventuale\\_e\\_colpa\\_cosciente/](http://www.penalecontemporaneo.it/area/3-/-/3292caso_thyssenkrupp_depositate_le_motivazioni_della_senenza_delle_sezioni_unite_sulla_distinzione_tra_dolo_eventuale_e_colpa_cosciente/)> accessed 30 September 2017.

### 1.1.2 Doctrinal basis

Regarding the second issue (the criteria for attributing liability), the administrative liability of the corporation requires that the crime committed be one of those mentioned in articles 24-25 duodecies of L.D. 231/2001 (so-called 'predicate offences' ('*reati presupposti*'))).

However, the corporation is not sanctioned only because one of the so-called predicate offences was committed. For corporate liability to arise, three conditions need to be met at the same time.

First, the predicate offence has to have been committed in the interest or to the benefit of the corporation (art 5 of L.D. 231/2001).<sup>3</sup>

Second, the perpetrator of the crime must be a person connected to the corporation in a qualified relationship: either high-level personnel<sup>4</sup> or employees<sup>5</sup> of the corporation (art5, a) and b) of L.D. 231/2001).

Third, according to the prevailing interpretation among scholars and in the case law, the law also requires the existence of some kind of corporate blame (*colpa d'organizzazione*).<sup>6</sup> This means that the corporation will be held accountable for the crime (and this is a direct administrative liability, which is added to the criminal liability of the perpetrator of the predicate offence) for not having adopted suitable instruments and procedures for preventing the crime from being committed: in other words, for failing to adopt (or for ineffectively implementing) an organisational and management model designed to prevent

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<sup>3</sup> Interest and benefit are mutually exclusive. The former (interest) emerges every time the crime is aimed at obtaining more advantageous conditions for the corporation and must always exist (at least to a minimal extent – if the perpetrator of the crime acted in their own personal interest, the corporation is not liable, under art. 5 para 2). Benefit is the tangible benefit (financial or otherwise) received by the corporation. It is very difficult to identify these two preconditions in the event of a culpable offence (in 2007 art. 25-*septies* was introduced, which extended corporate administrative liability for the crimes of murder and culpable personal injury, committed in violation of the laws on the protection of health and safety in the workplace). In culpable crimes, the event (death or injury) is not intentional, and certainly does not correspond to an interest and/or benefit of the corporation. The case law (Cass. Penale, Sez. Unite, 24 April 2014 (deposited 18 September 2014), Espenhahn, ThyssenKrupp Acciai Speciali Terni S.p.a, n. 38343, quoted *supra*) has clarified that in this case the benefit and interest refer to the behaviour: the omission (the failure to adopt the necessary anti-injury measures) is a benefit to the corporation, in terms of a cost saving.

<sup>4</sup> These are 'persons who hold representative, administrative or managerial roles in the corporation or in one of its departments having financial and organisational autonomy' (art 5, para 1, a))

<sup>5</sup> These are 'persons who are managed or supervised' by persons in senior positions (art 5 para 1, b)).

<sup>6</sup> The minimum criterion on which corporate liability is based (both for crimes committed by high-level personnel and those committed by employees) is corporate blame. But it is also possible that the crime is the expression of a company policy aimed at committing the crime (a criminal corporate policy). According to L.D. 231/2001, this occurs when 'the corporation or one of its departments is used with the sole or main aim of allowing or facilitating the commission of the crime'. This is the case, for example, of certain environmental crimes (such as the illegal trafficking of waste, art 25 *undecies*), crimes for the purposes of terrorism or subversion (art 25 *quater* para 3), the crime of genital mutilation (art 25 *quater*1) and international organised crime (art 10 para 4 of Law 146/2006), but not exclusively: each crime can be the result of a criminal corporate policy, in which case the corporate liability will be founded on a sort of malice on the part of the company. See E Dolcini, G Marinucci, *Manuale di diritto penale*. Parte generale, 5<sup>o</sup> edizione (Milan, Giuffrè 2015) 768.

offences (so-called 'compliance programme'),<sup>7</sup> or for not entrusting the task of overseeing the observance of the model to a body within the corporation with independent powers of initiative and control (so-called supervisory bodies).

It is worth noting that, in the case of a criminal act committed by high-level employees, there is a presumption of corporate blame, founded on the principle of identification of the corporation with its senior management: the acknowledgement of the criminal liability of high-level personnel implies that the corporation be held liable for the administrative offence, unless it can provide proof of its good actions (and therefore the absence of corporate blame). This burden of proof will be considered satisfied if the corporation can show evidence that, despite having an effective organisational model and efficient supervisory body, the corporation was unable to prevent the crime from being committed by high-level personnel because they 'fraudulently circumvented the organisational and management models'.

On the other hand, when the predicate offence was committed by an employee, the corporation is liable if the illegal conduct was made possible by the failure to comply with managerial and supervisory obligations (art 7, para 1). There is no reversal of the burden of proof here. So, the prosecution will have the burden of proving the gaps and/or malfunctioning of the organisational model and/or supervisory body. In any case, with an additional legal presumption (this time negative), the law excludes the failure to comply with managerial and supervisory obligations if the corporation, before the crime was committed, adopted and effectively implemented an adequate organisational and managerial model for preventing the kind of crime that was committed (art 7, para 2).

Finally, it is important to note that corporate liability, although requiring a crime committed by a physical person, is an independent and distinct type of liability. The corporation is liable for its own acts, due to a deficiency from an organisational point of view, in failing to prevent the 'corporate crime' from being committed. In other words, the corporation is not directly liable for the criminal act, but for a different offence, that is independent of the physical person's offence: the corporation's offence is complex in its structure, which is made up of the crime (the fundamental prerequisite), as well as a series of additional elements mentioned above (the qualified relationship between the perpetrator of the crime and the company, the company's interest in or benefit from the criminal conduct, and the failures in its system and policy of prevention).<sup>8</sup>

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<sup>7</sup> The essential characteristics of the organisational and managerial models, in order to be considered adequate in preventing crimes from being committed, are indicated in art 6, para 2. These models must also state the types of activity in which there is a risk that crimes will be committed; require that the supervisory body be informed; and include disciplinary sanctions for failure to comply with the model.

<sup>8</sup> See E Dolcini, G Marinucci, *Manuale di diritto penale*. Parte generale, 5° edizione (Milan, Giuffrè, 2015) 766 ff.; M Ceresa Gastaldo M, *Procedura penale delle società* (Turin, Giappichelli, 2015) 11 ff. The case law highlights that the corporation's offence is not identified as the crime committed by the physical person, Cass. Sez. VI, 5 October 2010, O.M.S. Salieri, Spa; the corporate blame thesis was also adopted by the Constitutional Court, 9 July 2014, no 218.

Highlighting the independence of corporate liability, art 8 of L.D. 231/2001 states that the corporation is liable even if the perpetrator of the crime on which the administrative offence depends has not yet been identified, or if there is a statute of limitation other than amnesty. It has also been argued that in the case of amnesty, the political reasons for granting clemency likely can be extended to the corporation, unless the law itself does not allow it; in any case a corporation that is interested in an acquittal can waive the extinguishing effect of amnesty.

From what we have examined so far, it would seem that Italian lawmakers, in regulating corporate liability, were inspired by non-European Anglo-Saxon models (US, Canada, Australia), which base corporate criminal liability on organisational failures or on criminal corporate policies. Therefore, the adoption of a prevention system or compliance programmes before the offence is committed becomes relevant; however, whereas in the Italian system this type of behaviour can become a reason to exempt the corporation from any liability, in the systems taken as models (in the US Federal system in particular) the adoption of compliance programmes is relevant only at the time of sentencing (as a reduction of the penalty) or at the time of prosecution (as a factor that can avoid the criminal prosecution of the corporation).

### *1.1.3 Scope of Corporate Liability for Criminal Offences*

Whereas some countries (France, for example) have established that corporate criminal liability applies to any type of crime (core crimes, i.e. those included in the jurisdiction of the ICC, as well as treaty crimes, for instance corruption, environmental crimes, trafficking crimes, financial crimes, tax crimes etc.), Italy has restricted CAR to certain specific crimes.<sup>9</sup>

The list of predicate offences, although it has expanded over time, to date does not include core crimes, but only treaty crimes.

Initially, the scope of application of corporate liability was limited to a series of voluntary offences against public administration or the European Union, as indicated in art 24 and 25 of L.D. 231/2001: corruption, extortion, misappropriation to the detriment of the State, of another public institution or of the European Union, and unlawful receipt of public or EU funds.

Subsequently, Italian lawmakers, mainly driven by international conventions, significantly extended the list of predicate offences. To date, the list includes, in chronological order:

- fraud against the State or other public institution for the purpose of obtaining public funds (art 24),
- certain crimes against the interests of the public administration (corruption, extortion, unlawful receipt of funds, etc.) (art 25),
- counterfeiting money (art 25bis, since 2001),
- corporate crimes (art 2 ter, since 2002),

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<sup>9</sup> Pursuant to article 26, corporate liability arises also when the crime is an attempted crime. The corporation is not punishable when it voluntarily impedes or prevents the action or event.

- crimes committed with the purposes of terrorism or subversion (art 25quater, since 2003),
- crimes connected to slavery and trafficking in human beings (art 25quinquies, since 2003),
- crimes of child prostitution, child pornography and child grooming (art 25quinquies, since 2003),
- market abuse (art 25sexies, since 2005),
- mutilation of female genitals (art 25quater 1 since 2006),
- certain serious transnational organised crimes (art 10 of law 146/2006) (e.g. conspiracy, mafia-related conspiracy, conspiracy for the purpose of drug trafficking, trafficking in tobacco or migrants, etc.),
- manslaughter and serious (or very serious) culpable personal injuries in relation to health and safety in the workplace (art 25septies, since 2007),
- receiving stolen goods, laundering, self-laundering and use of money, goods or benefits of illicit origin (art 25octies, since 2007),
- computer-related crimes and unlawful processing of personal data (art 24bis, since 2008),
- conspiracy, mafia-related conspiracy, vote exchange, offences committed under the conditions of art 416bis of the Criminal Code, or rather to facilitate mafia-related conspiracy, conspiracy for the purpose of drug trafficking (art 24ter, since 2009),
- counterfeiting of trademarks and patents (art 25bis, since 2009) and crimes against trade and commerce (art 25bis. 1, since 2009),
- copyright-related crimes (art 26nonies, since 2009),
- incitement to make false statements to the judicial authority (art 25decies, since 2009),
- environmental crimes (art 25undecies, since 2011),
- incitement to make illicit offers of benefits, bribery among private individuals, child grooming (since 2012),
- employment of illegal foreign workers (art 25duodecies, since 2012),
- new corporate crimes and new environmental crimes (25ter and 25undecies, since 2015).

#### 1.1.4 *Applicable sanctions*

Once the criminal court has established CAR, administrative sanctions are applied that affect the corporation's assets and activity. The sanctions imposed are:

- an administrative fine (art 10) (this measure is always compulsory),
- temporary disqualifications and debarment measures (ban on conducting business; suspension or revocation of authorisations, licences or concessions; ban on contracting with the public administration; exclusion from subsidies, funding or grants or revocation of any existing ones; ban on advertising goods and services) (art 13); they are applied in the case of repeat offences or if the corporation has made a significant profit and the crime was committed by its senior management or by employees, when the commission of the crime was facilitated by a serious organisational shortcoming; as an alternative to suspending the corporation's

- business activity, the court can also decide to appoint a judicial administrator (*commissario giudiziale*),
- definitive disqualifications and debarment measures (a permanent ban on conducting business) (art 16); this is applied when the corporation that has gained a significant profit has already been convicted three times in seven years, or when the corporation (or one of its departments) is regularly used for the sole or main purpose of allowing or facilitating the commission of crimes,
  - confiscation of the proceeds or profit of crime, or an equivalent measure (art 19) (this measure is always compulsory),
  - publication of the conviction (art 18).

To facilitate the re-establishment of legality and prevent the risk of new criminal acts, art 17 establishes that, notwithstanding the application of financial penalties, the disqualifications and debarment sanctions are not applied if the corporation has completed the following by the established deadline (the declaration of opening of the trial): 1) compensation for the consequences of the crime; 2) elimination of organisational deficiencies; 3) profit made available for confiscation.

## 1.2 Procedural law governing the prosecution of corporate crime

As mentioned, L.D. 231/2001 also set down the rules to establish the corporation's liability.

From a procedural point of view, the proceedings are modelled on the criminal ones. Indeed, since the administrative liability of the corporation presupposes that a crime was committed in its own interest and to its own benefit, lawmakers decided that ascertaining the corporation's offences and applying relative sanctions should fall under the jurisdiction of criminal courts. In particular, the jurisdiction over corporate administrative offences has been attributed to the criminal court having jurisdiction over the crimes (committed by a physical person) on which the corporation's offence depends (art 36).

As far as the *modus procedendi* is concerned, it was decided that the rules expressly stated by L.D. 231/2001 (art 36-83), as well as the provisions of the Code of Criminal Procedure, to the extent to which they are compatible (art 35), should be applied. L.D. 231/2001 also states that procedural rules applicable to the defendant (physical person) should be extended to the corporation (art 34).

That being said, we might conclude that, from a procedural point of view, special rules were introduced for prosecuting a corporation.

Based on these special rules, the corporation is prosecuted together with the physical person to whom the predicate crime is attributed, in a single trial, before a criminal court. Italian lawmakers therefore ruled that the two proceedings must be conducted jointly. This is a non-binding rule; there are a few exceptions allowed, in the presence of which it is possible to separate the two proceedings.<sup>10</sup> Besides, the corporation's liability is independent (art 8):

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<sup>10</sup> This can happen, for example, when the investigation of the administrative offence must be 'detached' from the assessment – suspended or defined in advance – of the crime (art 38).

the company can be punished if the crime is established, even if the perpetrator of the crime has not been identified, or is not imputable.

Following is a brief outline of the main provisions of the special procedural arrangements established for corporations by L.D. 231/2001:

- Jurisdiction: the jurisdiction is of the criminal court; for crimes committed abroad, the jurisdiction is based on the provisions of art 4,<sup>11</sup>
- Pretrial measures (or precautionary measures): besides the seizure of assets (preservation order or preventive seizure), during the proceedings the disqualifications and debarment sanctions outlined in art 9 might be applied in order to prevent repeat offences (see above, answer I.1.b),
- Due to a possible conflict of interest, the physical person accused of the predicate crime and the person legally representing the corporation cannot play the ‘witnesses role’ (i.e. they shall not testify),
- Preliminary investigations and preliminary hearing: preliminary investigations are carried out by the Public Prosecutor; at the end of the investigations the Public Prosecutor either dismisses the case or charges the corporation with an administrative offence, in accordance with criminal proceedings; the preliminary hearing can end with the case being dismissed or sent to trial,
- Special procedures: summary trial (*giudizio abbreviato*), plea bargaining (*patteggiamento*) and proceedings by decree are allowed, with some adaptation,
- Trial: before the trial is declared open, the corporation can request that the trial be suspended in order to compensate for the consequences of the crime; the possible outcomes of the trial are also listed (sentence that excludes the corporation from all liability (acquittal); sentence not to proceed (dismissal); conviction),
- Execution of applied sanctions: refer to the Code of Criminal Procedure.

Regarding the corporation’s legal representation in court:

- the corporation is represented by its own legal representative, unless this person is charged with the crime on which the administrative offence depends,
- the corporation has the right (not the obligation) to be present in court proceedings in the criminal trial; the corporation is requested to take part in the trial by presenting a written statement,
- if the corporation, duly notified of the proceedings or trial, does not appear before the court, it will be tried *in absentia*.

A widely debated issue is the admissibility of a civil action within the proceedings for determining the administrative liability of the corporation, with the aim of obtaining compensation for the damages caused directly by the corporate administrative offence. The case law has ruled out the option of bringing a civil action<sup>12</sup> for two reasons. First, because it is not allowed by L.D. 231/2001; secondly, because the corporation already bears civil liability (based on the Civil Code and art 185 *c.p.*) for the damages arising from the crime,

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<sup>11</sup> See para 2.1.

<sup>12</sup> Cass. sez. VI, 5 October 2010, O.M.S. salieri s.p.a

and it is not possible to determine a different damage than the one caused by the predicate crime.

### 1.3 Principles of jurisdiction

#### 1.3.1 *Defining jurisdiction*

In the Italian system the term 'jurisdiction' refers to activity aimed at the application of the law and the imposition of sanctions provided for by the law, in other words all the acts aimed at providing justice.

In this regard, the Code of Criminal Procedure (art 1 *c.p.p.*) specifies that criminal jurisdiction is exercised by the ordinary courts, but it does not contain any rule on the limits of Italian jurisdiction over a foreign national and for crimes committed outside Italy.

The limits of Italian criminal jurisdiction must be inferred from other laws, and specifically from the rules of the Criminal Code that regulate the scope of application of Italian criminal law (art 3, 6-10 *c.p.*).

In other words, there is a tight connection between the scope of application of Italian criminal law and the scope of exercise of jurisdiction, since the latter presupposes the applicability of criminal law. However, there is not a perfect correspondence between the two areas: for crimes committed abroad, sometimes the law places procedural obstacles to prosecuting the crime and to the criminal liability of the perpetrator, requiring, for example, the presence of the perpetrator within the State territory after the crime is committed (art 9 and 10), a request by the Minister of Justice (art 8, 9 para 2, 10 *c.p.*), a complaint by the victim or the failed extradition of the perpetrator (art 10 para 2 n. 3); for common citizens' offences 'double criminality' is also necessary.

It is therefore important to distinguish between the applicability of Italian criminal law (jurisdiction to prescribe) and the actual possibility of prosecuting foreign nationals or crimes committed abroad before an Italian court (jurisdiction to adjudicate).

#### 1.3.2 *Criteria for jurisdiction*

The general rules on Italian jurisdiction are contained in the Criminal Code (art 3, 6-10). These rules were introduced autonomously by the Italian legislature, in order to determine the scope of application of criminal law (and the scope of exercise of Italian jurisdiction) with regard to crimes committed by physical persons. Further rules on jurisdiction were introduced in the national legal system to comply with international obligations (as required by international conventions or by European Union law).<sup>13</sup>

For physical persons, the Criminal Code follows, as a basic rule, the principle of territoriality (art 6 *c.p.*), but also recognises Italian jurisdiction for many crimes committed by physical

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<sup>13</sup> International conventions often prescribe specific jurisdiction criteria. Typically these jurisdiction criteria are for the most part consistent with those independently set out in the Criminal Code or are a simple adaptation of them. See para 2.

persons outside the State, based on the Protective Principle, the Active Personality Principle (or Nationality Principle), the Passive Personality Principle and the Universality Principle.<sup>14</sup>

With regards to the administrative liability of the corporation for crimes committed abroad, specific rules are provided in art 4 L.D.231/2001, which states as follows:

- ‘1. In the cases and under the conditions provided for by articles 7, 8, 9 and 10 of the Criminal Code, those corporations that have their head offices in Italy are also liable for crimes committed abroad, provided that the State where the crime was committed does not intend to prosecute.
2. In the cases where the law states that the guilty party is punished on the request of the Minister of Justice, action is taken against the corporation only if the request is formulated against the latter’.

In this legal framework, when one of the predicate crimes mentioned in L.D. 231/2001 is committed abroad, and the conditions described in the Criminal Code (art 7-10 *c.p.*) are met, whereby an Italian court can proceed against the perpetrator, the corporation can also be held liable for the administrative offence dependent on the crime, as long as its head offices are in Italy (this is not the case if the company operates in Italy only through a secondary office or production centre).<sup>15</sup>

That being said, taking into account the crimes that can determine corporate liability, a corporation can be prosecuted for a crime committed entirely abroad in any of the following cases:

- for a limited number of crimes (art 7 *c.p.*: counterfeiting currency, crimes for the purposes of terrorism or subversion of democracy) Italian jurisdiction is unconditional,
- for ‘political’ crimes committed abroad, the jurisdiction to adjudicate is conditional on the request from the Minister of Justice and/or complaint by the victim, if necessary,
- for the majority of crimes mentioned in L.D. 231/2001, since the sentence is within the penalty limits established by arts. 9 and 10 *c.p.*, Italian criminal law is applicable, but the criminal prosecution and the determination of corporate liability depend on various factors, such as the presence of the perpetrator within the State territory after the crime was committed (arts. 9 and 10), the request from the Minister of Justice (art 8, 9 para 2, 10 *c.p.*) or the complaint by the victim, failure to extradite the perpetrator (art 10 para 2 no. 3); for common citizens’ offences ‘double criminality’ is also necessary.

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<sup>14</sup> On this point, see para 2.

<sup>15</sup> The law is silent on the opposite scenario: a crime committed in Italy in the interest of a company headquartered abroad. The case law (Tribunale di Milano, G.i.p., 27 April 2004, Siemens A.G.) and the prevalent legal scholarship consider that foreign legal persons are still obligated to observe Italian laws, irrespective of whether or not there exist in their country of origin laws governing this subject in a similar way. Art 3 *c.p.* applies to all those who, whether Italian or foreign nationals, are in the State territory.

Consequently, the chances of a company being actually held liable for crimes committed abroad are fairly low. Also, taking into account the needs of international cooperation and to prevent multiple prosecutions and multiple punishments, art 4 L.D. 231/2001 includes two further 'limitations': 1) a company will not be prosecuted for a crime committed entirely abroad when the State in which the crime was committed has already begun criminal prosecution; 2) should the request by the Minister of Justice be necessary to prosecute the physical perpetrator, a separate request must also be made by the Minister to prosecute the corporation.

A different situation emerges for so-called transnational crimes. According to the dominant opinion in the scholarship, Law no. 146/2006, which ratified the United Nations Convention against Transnational Organized Crime adopted by the UN General Assembly on 15 November 2000 (the so-called Palermo Convention or TOC) and the relative protocols,<sup>16</sup> introduced an exception to art 4, as a further expansion of extra-territoriality.

Notwithstanding the need to assess the abovementioned general preconditions for corporate liability (artt. 5, 6, 7, 8), the rules contained in the ratifying law (see art 10 of Law 146/2006) allow for prosecution of the corporation, regardless of the existence of the conditions specified in art 4, for a wide range of organised crime offences,<sup>17</sup> with regard to which only the concept of the 'transnational' nature of the offence imposes Italian jurisdiction.<sup>18</sup>

Finally, it is important to mention that, based on the general legal framework of the Criminal Code (art 6 *c.p.*), the offence is considered as being committed in the territory of the State if the action or the omission which constitutes the offence took place in part or wholly in the

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<sup>16</sup> For a definition of transnational crime, see article 3, UN Convention against Transnational Organized Crime (TOC): '1. This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of:

(a) The offences established in accordance with articles 5, 6, 8 and 23 of this Convention; and

(b) Serious crime as defined in article 2 of this Convention;

where the offence is transnational in nature and involves an organized criminal group.

2. For the purpose of paragraph 1 of this article, an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State'.

The Italian law ratifying the TOC has partially adapted this definition. According to art 3 of Law 146/2006, 'For the purposes of this law, a transnational crime is deemed to be the crime punished with a term of imprisonment of no less than the maximum of four years, if an organised crime group is involved, as well as:

a) if it is committed in more than one State;

b) or is committed in one State, but a substantial part of its preparation, planning and management took part in another State;

c) or is committed in one State, but a criminal organisation is involved which is engaged in criminal activities in more than one state;

d) or is committed in one State but has substantial effects in another State'.

<sup>17</sup> These are crimes of criminal conspiracy, mafia-related conspiracy, conspiracy aimed at trafficking tobacco, narcotics or migrants, incitement to bear false testimony to the Authorities and aiding and abetting.

<sup>18</sup> Scarcella A, 'La internazionalizzazione della responsabilita' da reato degli enti' (2016) *Rivista231* <<http://www.rivista231.it/>> accessed September 30, 2017.

territory, or when the consequences of the offence have taken place in the territory of the State. Therefore, when only one part of the criminal activity took place in Italy, or the crime produces effects in Italy or involves an organised group also operating in Italy or with people taking part from Italy, there should be no derogation of the principle of territoriality. The Italian corporation (or corporation headquartered in Italy) can be prosecuted regardless of the conditions outlined in art 6 *c.p.*

Ultimately, Italian rules on the 'jurisdiction to prescribe' state that criminal law is applicable to all crimes, by and against whomever they are committed, except for a limited number of crimes. These are petty crimes (art 9 and 10): misdemeanours; crimes punishable by financial penalties; crimes committed by foreign nationals against the Italian State or Italian citizens, punishable by up to one year's imprisonment, crimes committed by foreign nationals against European communities, against the interests of a foreign State or another foreign national, punishable by up to three years' imprisonment).

There are however procedural obstacles and conditions against prosecuting crimes committed abroad.

Overall, Italian legislation has built up instruments for foreign claims against individuals as well as corporations based in Italy.

#### 1.4 International Law / Human rights framework demanding corporate accountability

As mentioned, Italy does not consider the corporation's liability for 'core crimes', but only for treaty crimes. In particular, corporate administrative liability for offences resulting from a crime was introduced with L.D. 231/2001 to comply with the obligations deriving from the following international sources:

- Convention on the protection of the European Communities' financial interests, Brussels, 26 July 1995, and relative Protocols (Dublin Protocol, 27 September 1996; Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of said Convention, with annexed declaration, Brussels, 29 November 1996);
- Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, Brussels, 26 May 1997;
- OECD Convention on combatting bribery of foreign public officials in international business transactions, with annex, Paris, 17 December 1997.

After 2001, the list of predicate crimes on which the assessment of the corporation's liability depends was broadened, to comply with the obligations deriving from the following international sources:

- Framework Decision 2000/383/JHA of the Council of the European Union on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro;
- International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999;

- Framework Decision 2002/629/JHA of the Council of the European Union on combating trafficking in human beings;
- Report of the Fourth UN Conference on Women, 15 September 1995;
- UN Convention (and relative Protocols) on transnational organized crime;
- Directive 2008/99/EEC on the criminal protection of the environment.

### 1.5 Framework for Prosecuting a Cross-Border Case

If the term ‘cross-border case’ is used to refer to cases in which criminal activity crosses national borders, involving one or more States (if the crime was committed in many States, or it was committed in one State, but partially carried out, planned or prepared in another State), and assuming Italy is one of these States, pursuant to art 6 *c.p.* the crime is to be considered committed in Italy.

In accordance with the principle of territoriality, Italy has jurisdiction over the perpetrator (physical person) of the crime; in accordance with art 4 L.D. 231/2001 an organisation headquartered in Italy can be liable for the administrative offence attached to a crime before the criminal court with jurisdiction for ascertaining that crime. This is without the fulfillment of the conditions outlined in art 7-10 *c.p.*, which apply only to crimes committed entirely abroad.

As already mentioned, because the administrative offence that can be attributed to a corporation presupposes that a crime was committed in its interest or to its advantage by its employees (either in management or lower-level positions), in the criminal trial established for determining the predicate crime, the administrative liability of the corporation is also assessed. The jurisdiction for handling the corporation’s case is given to the criminal court and there is a preference for a single trial (the so-called ‘simultaneous trial’)

Although there is a single trial against the defendant and with regard to the corporation, different parameters and rules apply to both (see above, at § 1.2).

The perpetrator (physical person) is not required to be present at the trial. He/she has the right to be present in his/her own criminal trial, but can also participate *in absentia*; this happens when the person, having been made aware of the scheduling of the hearing or the proceeding, unequivocally decides (expressly or by tacit consent) not to attend, waiving his/her right.

A similar regulation is in place for corporations, to which L.D. 231/2001 (art 35) extends all the same procedural rules as for the defendant, since they are compatible. Therefore, the corporation has the right to take part in the trial through its legal representative, and for this purpose is required to submit a written declaration to the court. However, if the corporation does not appear before the court, the trial will continue and the corporation will be tried *in absentia*.

For transnational crimes see above, at § 1.3.2, with regard to Law no. 146/2006, which ratified the United Nations Convention against Transnational Organized Crime.

### 1.6 Prominent cases, media coverage

In Italy there have been cases (such as the *Thyssenkrupp* case in Turin,<sup>19</sup> the ILVA case in Taranto,<sup>20</sup> the '*Land of fire*' (*Terra dei Fuochi*) case in Campania<sup>21</sup> or the case of the HIV-infected plasma, which also happened in France) that drew public attention to the issue of corporate crime and corporations' liability for crimes committed in Italy by their upper management or employees.<sup>22</sup>

However, there was no discussion in the media about the usefulness and legitimacy of prosecuting corporations for violations of international law abroad.

It is important to note, however, that there are information campaigns underway (organised by NGOs, professional associations and media) aimed at raising public awareness on the issue of the lack of respect for human rights on behalf of corporations and the subject of corporate social responsibility. For many years now we have been witnessing events with damaging consequences, mainly caused by multinationals in less developed countries: large-scale and very serious cases of environmental pollution (such as oil spills in the sea or pollution of aquifers), exploitation of child labour in the manufacturing industry, inhumane and degrading work conditions (such as in the textile industry in Asia and China, or in the mining industry in Africa), discriminations based on gender, religion or ethnicity, brutal forced displacements of populations to make room for industrial plants or large-scale infrastructure.

Today in Italy, scholars and businesspeople alike highlight the concrete benefits that come from respecting human rights: avoiding the risks of convictions and compensation to aggrieved individuals or groups, when the rules of a State have been violated (whether civil law, administrative law or criminal law); also avoiding the reputational damage that occurs when the blame and indignation of public opinion towards immoral behaviour or human rights abuses negatively affect a company's image, and perhaps even sales of its products. It is definitely possible to increase consumer consensus towards a company's products or services by reassuring them that they were delivered in respect of human dignity and fundamental rights. The spread of organic certifications and indications of social sustainability on products demonstrate an increased focus of public opinion on these issues.<sup>23</sup>

## 1.7 Public debate on Corporate Social Responsibility

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<sup>19</sup> See < [http://www.lastampa.it/2016/05/13/cronaca/strage-thyssen-oggi-il-giorno-della-verit-su\]l8wttal10QEhGdmsGDgl/pagina.html](http://www.lastampa.it/2016/05/13/cronaca/strage-thyssen-oggi-il-giorno-della-verit-su]l8wttal10QEhGdmsGDgl/pagina.html) > accessed 30 September 30 2017.

<sup>20</sup> See < <https://it.wikipedia.org/wiki/Ilva> > accessed 30 September 30 2017; see also < <http://www.ecoblog.it/post/163608/ilva-italia-sotto-processo-alla-corte-europea> > 30 September 30 2017.

<sup>21</sup> See < [https://it.wikipedia.org/wiki/Terra\\_dei\\_fuochi](https://it.wikipedia.org/wiki/Terra_dei_fuochi) > accessed 30 September 30 2017.

See also < [https://it.wikipedia.org/wiki/Triangolo\\_della\\_morte\\_Acerra-Nola-Marigliano](https://it.wikipedia.org/wiki/Triangolo_della_morte_Acerra-Nola-Marigliano) > 30 September 30 2017.

<sup>22</sup> No data are available on CCR in prosecution or courts statistics.

<sup>23</sup> For example, see the informational campaign, 'Impresa e diritti umani: una guida per le piccole-medie imprese (PMI)', ed. ASVI, February 2016, in < [http://www.avsi.org/wp-content/uploads/2016/05/ITA\\_IMPRESA-E-DIRITTI-UMANI.pdf](http://www.avsi.org/wp-content/uploads/2016/05/ITA_IMPRESA-E-DIRITTI-UMANI.pdf) > accessed 30 September 30 2017.

There are no movements or initiatives in Italy like the Swiss '*Konzernverantwortungsinitiative*' (Responsible Business Initiative).

However, the issue of corporate social responsibility and a shared ethics of respect for human rights is the subject of debate in Italy: entrepreneurs,<sup>24</sup> NGOs whose mission is to defend and promote human dignity,<sup>25</sup> consumers' rights associations, and media<sup>26</sup> are involved in the debate and are trying to come up with guidelines or action plans for promoting the respect of human rights and Corporate Social Responsibility (CSR).<sup>27</sup>

Also, in keeping with the *Ruggie Principles* and EU law, the Ministry of Foreign Affairs, the Ministry for Economic Development, other Ministries and public administrations (both at an intergovernmental level and jointly with business associations and research centres) are designing, have developed or are promoting various tools for facilitating the process for corporations to respect and promote human rights. Among these are the creation of national plans, and the promotion of Corporate Social Responsibility (CSR) standards, guidelines and codes of conduct. It is worth mentioning the main ones:

- National Action Plan 2016-2021 on 'Guiding Principles on Business and Human Rights' (Interministerial Committee on Human Rights, Ministry of Foreign Affairs and International Cooperation). Italian action plan to implement UN Guiding Principles on Business and Human Rights, 1 December 2016. The plan has been the subject of a public consultation (which lasted until 1 September 2016), in which various NGOs and business associations took part.<sup>28</sup>
- National Action Plan 2012-2014 on corporate social responsibility (Ministry for Economic Development). Italian action plan to implement and develop corporate social responsibility.
- Platform for corporate social responsibility indicators (Ministry for Economic Development and Ministry of Labour). Project launched by an interregional work group composed of the Italian regions, the Ministry for Economic Development, the Ministry of Labour, the Ministry of Agricultural and Forestry Policies, Inea and Inail.

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<sup>24</sup> For example, see the Confindustria website on the subject of CSR, < <http://www.confindustria.it/Conf/link.nsf/CSR?openform> > accessed 30 September 30 2017 which also lists the various Italian organisations that deal with CSR.

<sup>25</sup> For example, see the abovementioned ASVI website, <[http://www.avsi.org/wp-content/uploads/2016/05/ITA\\_IMPRESA-E-DIRITTI-UMANI.pdf](http://www.avsi.org/wp-content/uploads/2016/05/ITA_IMPRESA-E-DIRITTI-UMANI.pdf)> accessed 30 September 30 2017.

<sup>26</sup> For example, see < <http://nonsoloambiente.it/category/sostenibilita/csr/> > 30 September 30 2017 (on the subject of Corporate Social Responsibility (CSR) and the environment).

<sup>27</sup> See also < <http://www.csr.unioncamere.it/P42A0C0S86/Documenti.htm>. The website > 30 September 30 2017 devoted to Corporate Social Responsibility, is hosted by Unioncamere (Unioncamere is a public organisation that aims to represent and protect the general interests of the Italian Chambers of Commerce before all institutional stakeholders at a local, regional, national and supranational level, including business, consumer and workers' associations).

<sup>28</sup> The text of PAN 2016-2021 and remarks by the various stakeholders (Amnesty International, AVSI, Confindustria, FOCSIV, Fondazione Solidas, Spes contra Spem, etc.) during the public consultation are available (in Italian and English) at <<http://www.cidu.esteri.it/ComitatoDirittiUmani/Menu/Ambasciata/News/>> accessed 30 September 30 2017.

The aim of the initiative is to become a tool to facilitate relationships between business and public administration. The system includes a toolkit for self-assessment of corporate social and environmental responsibility.

Finally, it is important to remember that for some time the legal world, business associations and/or the Association of Members of the Supervisory Bodies have been pressing for a reform of Italian legislation on corporate criminal liability.<sup>29</sup> To this end, in February 2016 the Minister of Justice and the Minister of the Economy appointed a special ministerial commission.<sup>30</sup> The draft proposal of this Commission is not available.

## 2 Holding Corporations Accountable – the Jurisdictional Issue

### 2.1 Jurisdiction in General

#### 2.1.1 General rules

The general rules on jurisdiction are laid down by the Criminal Code (*'Codice Penale'*, hereafter *c.p.*). Here are the main provisions:

- art 3 *c.p.* – applicability of Italian criminal law for anyone who is within the territory of Italy, whether they are Italian or foreign nationals;
- art 4 *c.p.* – notion of territory in terms of criminal law;
- art 6 *c.p.* – principle of territoriality (6.1); determines the *locus commissi delicti* based on the principle of ubiquity (6.2);
- art 7 *c.p.* – crimes committed abroad that are punishable unconditionally, in other words for which Italian jurisdiction can be claimed without conditions (according to the protective principle or principle of passive personality or according to the universality principle);
- art 8 *c.p.* – political crimes committed abroad: jurisdiction can be claimed under conditions and requirements as provided by law (request from the Minister of Justice and, for specific offences, upon complaint from the victim (according to the protective principle or principle of passive personality));
- art 9 *c.p.* – common offences committed abroad by Italian citizens: jurisdiction can be claimed (according to the principle of nationality or active personality) under

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<sup>29</sup> They argue that procedural measures are not suitable for the severe sanctions that may be applied; also with regard to substantive law, they request a review of the criteria of responsibility, which they consider ambiguous (it is debated whether a corporation is liable for the acts of another person or organisational shortcomings).

<sup>30</sup> < [https://www.giustizia.it/giustizia/it/mg\\_13\\_1\\_1.wp?previousPage=homepage&contentId=COM\\_1217402](https://www.giustizia.it/giustizia/it/mg_13_1_1.wp?previousPage=homepage&contentId=COM_1217402) > accessed 30 September 30 2017.

This is the Study Commission on the modifications to the legislative decree containing 'Regulations governing administrative responsibility of legal persons, companies and associations, including those without legal status'.

The goal of the Ministers is to conduct a survey (15 years after the legislative decree came into effect), in order to strengthen the fight against financial crime, which is considered a significant element of market distortion that hampers growth. The Commission's task is to propose regulatory reforms and, more generally, relaunch prevention policies.

- conditions and requirements regarding the seriousness of the crime (determined based on the penalty provided in the abstract) and its perpetrator:
- life sentence or up to 3 years in prison and presence of the perpetrator within the State territory
  - minimum sentence of up to 3 years and request from the Minister of Justice or complaint/request by the victim and presence of the perpetrator within the State territory
  - if committed against the European Communities, a foreign State or a foreign national: request from the Minister of Justice and extradition not granted or not accepted by the Government of the State in which the crime was committed
  - although not expressly set out by law, for all common offences committed abroad by an Italian citizen ‘double criminality’ applies;
  - art 10 *c.p.* – common crimes committed abroad by foreign nationals: jurisdiction can be claimed (according to the Protective/Defence principle or the Universality principle) under conditions and requirements that vary depending on whether the crime damages the State or an Italian citizen, or the European communities, a foreign State or a foreign national:
    - if against the Italian State or an Italian citizen: minimum penalty provided at least one year in prison and presence of the perpetrator within the State territory and request from the Minister of Justice or complaint/request by the victim
    - if against the European communities, a foreign State or foreign national: penalty of up to 3 years in prison and request by the Minister of Justice and presence of the perpetrator within the State territory and extradition not granted or not accepted by the Government of the State in which the crime was committed and double criminality (inferred from the reference to extradition).

### 2.1.2 *Territoriality*

That being said, following the principle of territoriality, jurisdiction is exercised by Italian Courts over nationals and foreign citizens, when the offence is committed within Italian territory (art 6.1 *c.p.*).

The concept of *locus commissi delicti* is identified under the principle of ubiquity: an offence is considered to have been committed in Italy (1) when the action or the omission is committed, in whole or in part, within Italian territory or (2) when the harm/effect occurs within Italian territory (art 6.2 *c.p.*)

### 2.1.3 *Offences committed abroad*

In case of offences committed abroad, Italian jurisdiction is claimed without any condition against Italian and foreign citizens:

for particular crimes offending the interests of the State, as expressly indicated by art 7, nos 1), 2), 3) *c.p.*<sup>31</sup> (*according to the Protective/Defence principle or Principle of passive personality*),

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<sup>31</sup> Art 7 *c.p.* states:

- for offences committed by Public officials in the service of the State in case of abuse of power or violation of duties relating to their functions (under the *principle of nationality or of active personality*), art 7 n. 4) *c.p.*,
- for all the offences for which laws or international treaties entitle Italian Courts to proceed (i.e. Italian Courts have jurisdiction regardless of the nationality of the offender, the victim and the place where the offence was committed, according to the *universality principle*), art 7 n. 5) *c.p.*

Further provisions under the General part of the Criminal Code (arts. 7-10 *c.p.*) deal with:

- political offences committed abroad by nationals or foreign citizens (art 8 *c.p.*),
- common offences committed abroad by a national (art 9 *c. p.*) or
- by a foreign citizen (art 10 *c.p.*) (in these cases, the exercise of jurisdiction is subject to different procedural or/and substantial requirements).

#### 2.1.4 *Political Offences committed abroad*

Save for offences under art 7 n. 1) *c.p.*, political offences (art 8.3 *c.p.*) committed abroad by a national or a foreign person are punished under Italian law upon request by the Minister of Justice (art 8.1 *c.p.*) and, with respect to specific offences, upon complaint by the victim (art 8.2 *c.p.*).

#### 2.1.5 *Common offences committed abroad by a national*

Following the principle of nationality (or active personality principle) the national who commits abroad a common offence punishable under Italian law by life imprisonment or by deprivation of liberty for no less than three years is punished under Italian law, if he/she is present within Italian territory (art 9.1 *c.p.*). In the case when the offence is punishable by deprivation of liberty for a shorter period, a request from the Justice Minister, or a petition or a complaint submitted by the victim is also required (art 9.2 *c.p.*).

If the offences were committed to the detriment of a foreign State, the European Union or a foreign citizen, the national offender is punished on request from the Justice Minister, unless extradition has not been granted (art 9.3 *c.p.*).

#### 2.1.6 *Common offences committed abroad by a foreign citizen*

Following the principle of defence (protective principle and passive personality principle), the foreign person who commits a common offence abroad against the Italian State or

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Crimes committed abroad. Italian law punishes any Italian or foreign citizen who commits any of the following crimes abroad:

- 1) crimes against the Italian state;
- 2) crimes of forgery of the seal of the State and use of such forged seal;
- 3) crimes of forging money, tax stamps or Italian public credit cards;
- 4) crimes committed by public officials at the service of the State, abusing the powers or violating the duties pertaining to their functions;
- 5) any other crime for which special legal provisions or international conventions establish the applicability of Italian criminal law.

against a national, which is punished under Italian law by life imprisonment or by deprivation of liberty for no less than one year is punished under Italian law, if he/she is present within the Italian territory, on request from the Justice Minister, or on petition or complaint by the victim (art 10.1 *c.p.*).

Following the universality principle, if the offence was committed abroad by a foreign person against a foreign State, the European Union or a foreign citizen, the offender is punished under Italian law if (1) he/she is present within Italian territory; (2) the offence is punishable by life imprisonment or by deprivation of liberty for no less than three years; (3) the extradition has not been granted to the State where the offence was committed or to the State to which the foreign offender belongs (art 10.2 *c.p.*).

The special part of the Criminal Code establishes special jurisdictional rules in particular cases: Law 3.VIII.1998 no. 269, introducing in the Criminal Code sexual offences against children, provides Italian jurisdiction over such crimes as well as over other sexual crimes, when the offence is committed abroad by a national, or against a national, or by a foreign citizen in complicity with a national, in this last case provided that the minimum penalty is five years and the Justice Minister so requests (art 604 *c.p.*).

#### 2.1.7 *Rationale of rules on jurisdiction*

Ultimately, Italian rules on jurisdiction always assume an interest of the State in criminal prosecution, but to every connecting factor corresponds a more or less intense interest in prosecution.

Territoriality perhaps satisfies most of the needs of the State (which is identified by its own territory), so much so that it is the basic rule.

The personality principle and the protective principle have an extensive function and are based on mistrust in other States (there is fear that other States may not prosecute). But whereas the active personality principle seems to come mainly from the State's need to safeguard its citizens, the protective principle answers the need to protect the State's own interests.

The universality principle in the past was consistent with the idea of a universal State, which aspires to impose its own national law on all men; in modern times, it is an expression of international solidarity among States regarding matters that infringe upon universal human rights (and in the defence of which there is a common interest: think of genocide, piracy, drug trafficking, slavery, etc.).<sup>32</sup>

All these considerations also apply to corporations. The prosecution of corporations for crimes committed abroad fits into that doctrine.

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<sup>32</sup> Extensively on the subject, F C Palazzo, voce *Legge Penale*, in *Dig. Disc. Pen.*, vol. VII (Turin, Utet, 1993) 368-369; A Panzera, voce *Giurisdizione penale (limiti)*, in *Dig. Disc. Pen.*, vol. VI (Turin, Utet, 1992) 4 ff.

## 2.2 Territorial Jurisdiction: legal framework and jurisprudence

As mentioned, the Criminal Code adopts the principle of territoriality (art 6 *c.p.*) as a basic rule, but then recognises Italian jurisdiction for many offences committed by physical persons outside the State territory, abroad, based on the Protective principle, the Active Personality Principle (or Nationality Principle), the Passive Personality Principle and the universality principle.

Following the principle of territoriality, jurisdiction is exercised by Italian Courts over nationals and foreign citizens when the offence is committed within the Italian territory (art 6.1).

The concept of *locus commissi delicti* is identified under the principle of ubiquity: an offence is considered to have been committed in Italy (1) when the action or the omission is committed, in whole or in part, within the Italian territory or (2) when the harm/effect occurs within the Italian territory (art 6.2)

In the case law there is a tendency to broaden the concept of territoriality: Italian Courts exercise jurisdiction even if just a segment of the event occurred within the national borders; therefore, the territoriality principle is applied with respect to a very large number of offences, including those relevant for Corporate Administrative Responsibility (CAR).<sup>33</sup>

## 2.3 Extraterritorial Jurisdiction

The Italian system has no presumption against extra-territorial jurisdiction. For interests protected and recognized, see at § 2.1

### 2.3.1 Corporations and the Active Personality (or Nationality) Principle

As mentioned, in order to establish CAR it is necessary to determine that a predicate crime was committed by a natural person. Therefore if, based on the active personality principle, Italian jurisdiction is to be applied towards the perpetrator of the crime, the corporation might be held liable for the administrative offence, under the following conditions:

- The corporation can be persecuted only for offences depending on certain specific crimes (see at § 1.1)
- The corporation must have its headquarters in Italy and the conditions per art 4 L.D. 231/2001 must be satisfied: (a) failure to prosecute by the State where the crime was committed and b) request from the Minister also with regard to the corporation, if this request is necessary to persecute the physical person – see at § 1.2)
- The ‘head office’ (and, therefore, the nationality of the corporation) can be determined in accordance with commercial or bankruptcy laws (in other words based on where most of the administrative and management activities of the corporation are conducted, without considering the location of production activities); also the concept of ‘permanent organisation located in the Italian territory’ can be taken into account for the purposes of VAT and the corporation’s income tax.<sup>34</sup>

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<sup>33</sup> See para 2.3.7.

<sup>34</sup> Cass. Sez III, 26/05/2010 (deposited 28/07/2010) in CED Cass. no 248109, stated that, on the subject of VAT,

- In the case of a parent company, the independence of the daughter companies should remain intact; so, if the latter are headquartered in Italy, they will also be prosecuted for crimes committed, in their interest or to their benefit, entirely abroad.<sup>35</sup>

### 2.3.2 Corporations and the Passive Personality Principle

As mentioned, the Criminal Code adopts the principle of territoriality as a basic rule (art 6 *c.p.*), but then extends Italian jurisdiction to many offences committed by physical persons outside the State territory, abroad, based on the Protective principle, the Active Personality Principle (or Nationality Principle), the Passive Personality Principle and the Universality Principle.

In accordance with the Passive Personality principle, Italian jurisdiction is recognised (with regard to physical persons):

- for the crimes indicated in art 7, numbers 1) 2) 3) *c.p.* (without conditions, for natural persons),
- for political crimes (art 8 *c.p.*), under conditions and requirements provided by law,
- for common offences committed abroad by a foreign national to the detriment of the Italian State or Italian citizens (art 10.1 *c.p.*) under conditions and requirements provided by law.<sup>36</sup>

Corporations can be held liable under the passive personality principle, under conditions and requirements as provided in art 4 L.D. 231/2001 or Law 146/2006 (law ratifying the *TOC Convention*).<sup>37</sup>

If jurisdiction is recognised towards a corporation, problems can arise if the offence committed abroad is punished under Italian law with a period of imprisonment which does not reach the minimum penalty to claim jurisdiction under art 10 *c.p.*

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the notion of a permanent organisation located in the Italian territory of a foreign corporation can be inferred from ar. 5 of the OCSE convention model against double taxation and its commentary, integrated with the requirements established by art 9 of the 6th EEC Directive no 77/388 of the Council of 17 May 1977, for determining a permanent location of activity, which, as defined by ECJ case law, consists of a structure equipped with material and human resources, and can also be comprised of an entity with legal personality, to which the foreign corporation has entrusted the management of its affairs (except for merely planning or auxiliary activities, such as consultations or sharing of know how).

<sup>35</sup> See E Rosi, *Il rischio di procedimenti penali paralleli per fatti di corruzione internazionale (draft January, 29<sup>th</sup>, 2013)* in < [http://www.paradigma.it/docupload/docdocumenti/2013124175656\\_\\_rosi.pdf](http://www.paradigma.it/docupload/docdocumenti/2013124175656__rosi.pdf) > accessed 30 September 30 2017.

<sup>36</sup> See para 2.1.

<sup>37</sup> See para 2.1.

### 2.3.3 Corporations and the Protective Principle

The general rules on jurisdiction currently in force in Italy follow the Defence principle/Protective principle, according to which Italian jurisdiction is recognised (with regard to the physical person):

- For crimes indicated by art 7, nos 1) 2) 3) *c.p.* (counterfeiting currency, crimes for the purposes of terrorism and subversion of democracy – the jurisdiction is unconditional)
- For political crimes (art 8 *c.p.*), under conditions and requirements provided by law.
- For common citizens' offences committed abroad by a foreign national to the detriment of the Italian State or Italian citizens (art 10.1 *c.p.*) under conditions and requirements provided by law.<sup>38</sup>

Corporations can be held liable under the defence principle, under conditions and requirements as provided in art 4 L.D. 231/2001 or Law 146/2006 (law ratifying the *TOC* Convention).<sup>39</sup>

If jurisdiction is recognised towards a corporation, problems can arise if the offence committed abroad is punished under Italian law with a period of imprisonment which does not reach the minimum penalty to claim jurisdiction under art 10 *c.p.*

As a member of the UN and the EU, Italy signed the international boycott of certain countries, but has never adopted sanctionary measures such as those contained in the U.S. Helms-Burton Act.

In addition to the administrative sanctions contained in L.D. 231/2001, the corporation has civil liability for damages deriving from (criminal and civil) offences committed by its own employees. This opens up the possibility of tort claims against the corporation.

As far as the criteria for determining civil jurisdiction are concerned, based on EU law (EU Regulation 1215/12, the so called Regulation Brussels 1bis), if there is criminal jurisdiction for investigating the crime, there is also jurisdiction in relation to the civil-law request for compensation for damages; for tort claims, jurisdiction is determined based on the where the damaging event took place.<sup>40</sup>

In relations with non-EU States, jurisdiction is determined based on connecting factors established by international private law (in particular Law no. 218/95), which gives

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<sup>38</sup> See para 2.1.

<sup>39</sup> See para 2.1.

<sup>40</sup> See Article 7 para (2) and (3) of Regulation EU 1215/12 [2012] OJ L 351/1:

'A person domiciled in a Member State may be sued in another Member State: [...]

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

(3) as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings; [...]

significance to the citizenship/residence/domicile of the defendant (art 3) and determines which law to apply to the corporation (art 25, 2h) as well as in the case of tortious liability (art 62).

### 2.3.4 *Jurisdiction over military personnel and/or private military contractors*

#### *Jurisdiction to prescribe*

The issue of criminal laws applicable to military personnel should be considered as follows: whereas the *Military Penal Code for Peace Time (cpmp)* finds a natural application when Italy is not at war with any State, the *Military Penal Code for War Time (cpmg)* applies, as specified in art 3, 'from the moment of the declaration of a state of war until the moment of its cessation'.

Law 31 January 2002 no. 6 and Law 27 February 2002, no. 15 have partially modified the *cpmg*:

- It has been established that, in peace time, the *Military Penal Code for War Time* applies only to armed military operations, whereas, for example, those in which military forces only rescue civilian populations from natural catastrophes are excluded,
- The *Military Penal Code for War Time* has been made to be consistent with the provisions of international humanitarian law, by imposing respect for these laws not only during an actual war, but also in the event of a mere armed conflict, whether it be an international armed conflict or a domestic armed conflict.

#### *Jurisdiction to adjudicate*

There has always been a tendency for States to maintain as much as possible their jurisdiction, especially criminal jurisdiction, over their own military personnel stationed abroad. This is first and foremost because of the effect that 'abandoning' the national military to foreign jurisdiction would have on the overall military organisation; and also, so as avoid subjecting citizens to inferior legal standards to those enjoyed within its own territory.

The legal framework governing the exercise of the jurisdiction of the flag State over its own military has been customary since before the First World War. During this period, the stationing of expedition forces abroad, with prior consent from the host state, was a temporary phenomenon that did not require excessively detailed legislation; as a consequence, the sending state would normally maintain its jurisdiction in criminal matters over its military personnel for events occurring during the exercise of its own functions; on the other hand, it allowed for the prosecution of its own military for events occurring outside these assigned institutional tasks.

After the Second World War, the tendency of adopting international agreements (so called Status of Forces Agreements (*SOFAs*)) on stationing national military abroad provided detailed legislation on the distribution of criminal and civil jurisdiction. The basic models can be found in the *NATO SOFA* and in the *UN Model SOFA*. These models, conceived for multinational operations abroad (peace-keeping or peace-enforcing), regulate the relations

between foreign forces and local authorities (the content and limits of the immunity of military personnel) but not relations between military forces, which tend to be governed by the flag state's laws.<sup>41</sup>

### 2.3.5 Vicarious Jurisdiction – *Stellvertretende Strafrechtspflege*

Within the scope of application of Italian jurisdiction there are number of cases in which the possibility to prosecute the perpetrator (physical person) of the crime is conditioned by the failure to extradite (for example for common offences committed by Italian nationals abroad to the detriment of the European communities, a foreign State or a foreign national, art 9.3 *c.p.*; common offences committed by foreign nationals abroad, art 10.2).

As far as the corporation is concerned, vicarious jurisdiction seems to be the rule: as previously mentioned, for crimes committed abroad art 4 L.D. 231/2001 allows prosecution of the corporation if the State in which the event occurred does not act.<sup>42</sup> Also, if for the type of crime the jurisdiction depends on a request from the Minister of Justice, the corporation can be prosecuted only if there has been an independent request for it.

### 2.3.6 Universal jurisdiction

Although the basic rule governing jurisdiction is the principle of territoriality, Italy, especially under the influence of international conventions aimed at fighting against certain types of crime, has gradually extended its jurisdiction, giving increasing space to the universality principle. Some scholars argue that the Criminal Code shows a tendency to adhere to the universality principle (there is talk of 'tempered' universality).<sup>43</sup>

Based on the universality principle, Italian jurisdiction is recognised (with regard to the physical person):

- for all the offences for which laws or international treaties entitle Italian Courts to proceed (i.e. Italian Courts have jurisdiction regardless of the nationality of the offender, the victim and the place where the offence was committed), art 7, n. 5) *c.p.*
- Any type of crime can be subject to the universality principle.

The universality principle is followed as an expression of international solidarity between States with regard to events that offend universal human rights (and whose protection is a common interest: think of genocide, piracy, drug trafficking, slavery, etc.).

Corporations can be held liable under the universality principle, under conditions and requirements as provided for by art 4 L.D. 231/2001 or provided in Law 146/2006 (law ratifying the TOC Convention), but only for 'treaty crimes' (not for 'core crimes').<sup>44</sup>

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<sup>41</sup> See Corte di Assise di Roma, no 21, 25/10/2007 (deposited 3/1/2008), on the case of the murder of the SISMI official Calipari by the US military personnel at a checkpoint near Baghdad.

<sup>42</sup> See *ibid* para 1.3

<sup>43</sup> E Dolcini, G Marinucci, *Manuale di diritto penale*. Parte generale, 5° edizione (Milan, Giuffrè, 2015) 134. This thesis is not shared unanimously. For an overview of the different opinions, see A Cadoppi, S Canestrari, P Veneziani (eds), *Codice penale commentato con dottrina e giurisprudenza* (Piacenza, La Tribuna, 2010) 129 ff.

<sup>44</sup> See *ibid* para 1.3.

### 2.3.7 Other sources of jurisdiction (i.e. 'creative' grounds of jurisdiction)

As mentioned, in the case law there is a tendency to broaden the concept of territoriality: courts exercise jurisdiction even if just a segment of the event occurred within the borders.<sup>45</sup> Therefore the territorial principle is applied with respect to a very large number of offences, including those relating to Corporate Administrative Responsibility (CAR).

This is true for organised crime<sup>46</sup> and also for white-collar crimes (for instance, international corruption).<sup>47</sup>

## 3 Jurisdiction for Prosecuting Corporations under International Law (UN Law, multi-lateral treaties)

### 3.1 General

In the Italian legal system, alongside the regulations on jurisdiction contained in the Criminal Code, there are also rules that have been adopted to comply with international obligations. These are regulations designed to affirm criminal jurisdiction with regard to physical persons, but which can also be extended to corporations, in accordance with art 4 L.D. 231/2001.

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<sup>45</sup> The case law is consistent on this point. For a few examples, see Cass. Sez. VI, 24/04/2012 (deposited 27/04/2012), in CED Cass., no 252507: 'For the purposes of affirming Italian jurisdiction in relation to crimes committed partly abroad, it is sufficient that even a small part of the event occurred in the State territory, which, even without requisites of suitability and unambiguousness needed to attempt the crime, is significant enough to connect the part of the conduct carried out in Italy with the part carried out abroad'. See also Cass. Sez. IV, 17/12/2008 (deposited 22/04/2009), in CED Cass., no 243476; Cass. Sez. VI, 06/05/2003 (deposited 19/06/2003) in CED Cass., no 225966.

<sup>46</sup> For example: Cass. Sez. VI, 28/10/2008 (deposited 29/10/2008) in CED Cass., no 241519: For the purposes of affirming Italian jurisdiction in relation to crimes committed partly abroad, it is sufficient that even a small part of the event occurred in the State territory, which, even without requisites of suitability and unambiguousness needed to attempt the crime, is significant enough to connect the part of the conduct carried out in Italy with the part carried out abroad. (In applying this principle, the Court, on the subject of the European arrest warrant, considered committed partially in the State the crime of conspiracy charged against co-perpetrators who had maintained telephone contact from Italy with the criminal organisation whose structure and operations were based abroad); see also Cass. Sez. VI, 19/01/2001, in CED Cass., no 249636, according to which, in the case of conspiracy, in order to determine the subsistence of Italian jurisdiction, it is necessary to verify where the organisational structure was created, in whole or in part, whereas of secondary importance is the place in which the individual crimes were committed in executing the criminal plan.

<sup>47</sup> Cass. Sez. VI, 30/09/2010 (deposited 1/12/2010), in CED Cass., no 248594, regarding international corruption crimes committed by employees in the interest and to the benefit of two corporations (ENI s.p.a. and SAIPEM s.p.a.) operating within a joint venture. According to the charge, the crime was the payment of bribes for more than \$187 million to Nigerian public officials, including Heads of State, members of the executive, presidents of state-owned Nigerian National Petroleum Corporation and other parties, to obtain EPC (Engineering, Procurement and Construction) contracts for liquefying natural gas in an area of Nigeria; payments of said bribes were allegedly made through companies headquartered outside Nigeria. In this case the Court of Cassation stated that the jurisdiction of the Italian courts must be recognized since significant parts of the alleged crimes were carried out in Italy.

Customary international law does not usually require States to base jurisdiction on certain criteria, nor does it prevent States from basing their jurisdiction on a few criteria. By way of exception, customary rules on jurisdiction (to which Italy has adapted in accordance with article 10 of the Constitution) are those excluding the exercise of Italian jurisdiction with regard to certain individuals (for example foreign Heads of State and foreign diplomats).<sup>48</sup> Customary is also the principle (adopted by the Geneva Convention on the High Seas of 29/04/1958 and the *Montego Bay Convention* of 10.12.1982) that allows a capturing State to bring before the courts perpetrators of acts of piracy on the high seas.

Then, there are various rules that include jurisdiction criteria designed to conform to international criminal law conventions, which require States to adopt specific jurisdiction criteria to fight against the crimes they describe. An examination of the main Conventions that the Italian State has signed shows that these jurisdiction criteria for the most part are consistent with those already independently stated in the Criminal Code and are just simple adjustments to them. The territoriality principle (*locus commissi delicti*)<sup>49</sup> is very common; in some conventions, jurisdiction is determined by the presence of the perpetrator in the State territory;<sup>50</sup> various criteria aimed at protecting a citizen (against whom the crime was committed) or the State itself are based on the defence principle;<sup>51</sup> regulations that require citizenship (or habitual residence, for stateless people) of the State in which the trial takes place as a criterion for jurisdiction are based on the active personality principle.<sup>52</sup>

### 3.2 Jurisdiction prescribed by International Humanitarian Law

Italy has tended to implement the jurisdictional elements of International Humanitarian Law, specifically:

- Art 4 and art 5<sup>53</sup> of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (and other international legislation on torture): this UN Convention was ratified and enforced in 1984. The jurisdiction criteria in art 5 (territoriality, active personality, passive personality) of the UN Convention match the jurisdiction criteria in the Criminal Code; there is however broad debate on the implementation of art 4, which introduces a duty of

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<sup>48</sup> A Panzera, voce Giurisdizione penale (limiti), in Dig. Disc. Pen., vol. VI (Turin, Utet, 1992) 7.

<sup>49</sup> For example art 6 Convention on the Prevention of Genocide, 09/12/1948; art 3 para 1 UN Convention 14.12.1973 for preventing and suppressing crimes against people who have special international protection; art 5 n 1 point a) UN Convention Against the Taking of Hostages, 17/12/1979.

<sup>50</sup> For example art 3 no 2 UN Convention 14/12/1973 quoted; art 5 n 2 UN Convention Against the Taking of Hostages, 17/12/1979; art 6 of the 21/01/1977 European Convention on the suppression of terrorism; art 4 of the EU Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16/02/1970 (replaced by the new Convention on Civil Aviation, 2010).

<sup>51</sup> For example art 5 para 1, point d) UN Convention 14/12/1973 quoted.

<sup>52</sup> For example, art 3 para 1, point b) UN Convention 14/12/1973 quoted; art 5 para 1 point b) UN Convention Against the Taking of Hostages, 17/12/1979.

<sup>53</sup> Art 4 and Art 5 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

- criminalisation of torture.<sup>54</sup> It is also worth noting that a company's CAR does not apply to 'core crimes', but only to treaty crimes specifically indicated in L.D. 231/2001.
- Art 4 and 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,<sup>55</sup> supplementing the United Nations Convention against Transnational Organized Crime of 2000: this Protocol was ratified and enforced in Italy with Law no. 146 of 16 March 2006 (date of deposit of the instrument of ratification: 2 August 2006; enforced in Italy on 1 September 2006); for human trafficking crimes, L.D. 231/2001 expressly indicates CAR;
  - Art 36<sup>56</sup> of the UN Single Convention on Narcotic Drugs of 1961: this UN Convention and the relative Protocol of 1972 were ratified and enforced in Italy with Law 5 June 1974, no. 412; for these crimes L.D. 231/2001 expressly indicates CAR;
  - Art 4<sup>57</sup> of the UN Convention for the Suppression of Terrorist Bombings of 1997 – this UN convention was ratified by Italy with Law 14 February 2003, no. 34; for these crimes L.D. 231/2001 expressly indicates CAR;
  - Art 4 and 5<sup>58</sup> of the UN Convention for the Suppression of the Financing of Terrorism of 1999: this UN Convention was ratified by Italy with Law 14 January 2003, no. 7; apart from introducing into the Criminal Code new types of crime, the ratifying law expressly indicates CAR crimes with the purpose of terrorism or subversion of democracy (art 25 *quarter* L.D. 231/2001).

## 4 Overlapping Domestic Legal Frameworks and the Prosecution of Corporations

### 4.1 Conflicts of jurisdiction – General

Although the territoriality principle remains the basic rule on the subject of jurisdiction (art 6 *c.p.*), the Criminal Code recognises Italian jurisdiction for many crimes committed abroad, in accordance with the Protective principle, the Active Personality Principle (or Nationality Principle), and the Passive Personality Principle. Also, under the stimulus of international conventions, Italy has given ample space to the universality principle.

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<sup>54</sup> In the Italian legal system the crime of torture does not exist as an independent type of crime. As many scholars have pointed out, there are only 'scattered fragments' of the definition of torture in the Criminal Code (beatings, kidnappings, illegal arrests, injury, abuse of office against arrested or detained subjects, etc.: Bartole S, Conforti B., Raimondi G., *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali* (Padua, Cedam, 2001) 75-76). On several occasions, international organisations (not only the Committee against torture, but also other supervisory bodies, because torture is considered a crime by other conventions, of which Italy is a contracting party) have recommended that Italy introduce the crime of torture. Various draft laws have passed through Parliament aimed at introducing the crime of torture in the Criminal Code. But the legal procedure was never completed. See the Amnesty International website at <<https://www.amnesty.it/campagne/italia/?gclid=CKykt4Tsm9ECFRcz0wodnn8How>> accessed 30 September 30 2017.

<sup>55</sup> Art 4 and 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000.

<sup>56</sup> Art 36 of the UN Single Convention on Narcotic Drugs of 1961.

<sup>57</sup> Art 4 f the UN Convention for the Suppression of Terrorist Bombings of 1997.

<sup>58</sup> Articles 4, 5, 6 and 7 of the UN Convention for the Suppression of the Financing of Terrorism of 1999.

If one adds to that the fact that in the case law there is a tendency to broaden the concept of territoriality, one can conclude that the Italian system is rather dominant in claiming jurisdiction in cross-border cases; therefore, a problem of positive conflicts of jurisdiction could arise in prosecution against individuals and corporations.

In addition to the criminal/administrative sanctions provided by L.D. 231/2001, the corporation has civil responsibility for damages arising from (criminal and civil) offences committed by its own employees. This also opens up the possibility of tort claims against the corporation.

As for the criteria for determining civil jurisdiction, based on EU law (EU Regulation 1215/12, the so-called Brussels Regulation 1bis) the rule is that if criminal jurisdiction applies for investigating and prosecuting the crime, jurisdiction also exists in relation to the civil-law request for compensation for damages; for tort claims, the jurisdiction is determined based on where the harmful event occurred.<sup>59</sup>

In relations with non-EU States, jurisdiction is determined based on connecting factors established by international private law (in particular Law no. 218/95), that gives weight to the citizenship/residence/domicile of the defendant (art 3) and identifies the law to be applied to the corporation (art 25, 2, h) as well in the case of tortious liability (art 62).

#### 4.2 Solutions for Conflicting International Jurisdictions?

With regard to prosecutions of individuals (physical persons), the prevention and the settlement of conflicts of jurisdiction is a relevant and urgent issue, particularly because the increase in transnational crime can easily lead to an overlapping of jurisdictions.

The principle of *ne bis in idem* is expressly recognized in Italian law only in relation to domestic proceedings. As far as international conflicts of jurisdiction are concerned, the system provides very basic rules under artt. 9 and 10 of the Penal Code (1930): jurisdiction is not claimed over offences committed abroad if extradition has been accorded. Nevertheless, also if a foreign final decision on the same matter has already been issued, art 11 *c.p.* claims Italian jurisdiction over offences committed in Italy by a national or a foreign offender. Italian jurisdiction is claimed as well as over offences under arts 7, 8, 9, 10 *c.p.* committed abroad by a national or a foreign offender, provided that the Justice Minister so requests. On the contrary the Code of Criminal Procedure (1988) does not allow for Italy to extradite or to proceed for the same facts (art 739) when a foreign decision was recognized for execution purposes by national law (art 731).

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<sup>59</sup> See Article 7 para (2) and (3) of Regulation EU 1215/12 [2012] OJ L 351/1:

‘A person domiciled in a Member State may be sued in another Member State: [...]

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

(3) as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings; [...].’

The problem of pending proceedings at the international level is taken into account also by L.D. 231/2001, establishing the administrative liability of legal entities arising from a crime. As an exception to the general rule, there is no liability for legal entities headquartered in Italy in case the State of *commissi delicti* is proceeding for the fact.

Regardless of the national provisions, it should be stressed that Italy is bound by the Conventions it has ratified and by the instruments of the European Union.

As far as the prevention of conflicts of jurisdiction is concerned, the European Convention of extradition of 1957 and other treaties on specific offences regulate the situation of pending proceedings. Italy is bound, at a European level, by Framework Decision 2009/948/JHA. The Framework Decision aims to prevent situations where the same person is subject to parallel criminal proceedings in different Member States and to avoid the final infringement of the principle of *ne bis in idem* by direct consultations among Member States who have jurisdiction, in order to reach consensus on an effective solution. Italy implemented this FD in 2016, with Legislative Decree 29/2016.<sup>60</sup>

Finally, in the international Conventions (in particular in the *Palermo Convention*, for TOCs), the problem of parallel investigations and in general the theme of jurisdiction was solved with a simple reference to the ability to exercise 'coordinate jurisdiction'. On this matter, see art 15 of the *Palermo Convention*, in particular paragraphs 4 and 5.<sup>61</sup>

## 5 Proposals for Reform of the Legal Framework of Jurisdiction

In Italy, the legal community, business organisations and the Association of Members of Supervisory Bodies have been requesting a reform of the CAR legislation in L.D. 231/2001 for quite some time. The Ministry of Justice even appointed a Commission to reform said legislation. The debate on the prospects for reform is not, however, about rules on jurisdiction.

## 6 Conclusion

As mentioned, to comply with international obligations, Italy has introduced direct responsibility of corporations for crimes committed in the Italian territory, in their interest or to their benefit, by their employees. This is a case of CAR, not CCR.

In accordance with art 4 L.D. 231/2001, in the cases and under the conditions described in art 7, 8, 9, 10 *c.p.*, the corporation might be called upon to appear before an Italian court for crimes committed abroad, as long as: a) its headquarters are in Italy; b) the State in which

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<sup>60</sup> See <<http://rivista.eurojus.it/prevenzione-e-risoluzione-dei-conflitti-di-giurisdizione-in-ambito-penale-lordinamento-italiano-da-attuazione-alla-decisione-quadro-2009948gai/?print=pdf>> accessed 30 September 30 2017.

<sup>61</sup> [...] 4. Each State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her. 5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

the offence occurred is not already prosecuting it (the State of *commissi delicti* is not proceeding for the fact).

In the case of multinational corporations or corporations that conduct part of their business outside the national borders (for example by outsourcing production, or taking part in foreign calls for tenders) the following four scenarios are possible:

- 1) Foreign corporation operating in Italy: it can be called upon to appear before an Italian court if the crime was committed in Italy, in its interest or to its benefit, by its employees, based on art 3 *c.p.p.*<sup>62</sup>
- 2) Italian corporation operating abroad:
  - a. Crime committed partly in Italy, partly abroad: the corporation can be called upon to appear before an Italian court if the crime was committed in Italy, in its interest or to its benefit, according to the territoriality principle (art 6 *c.p.*);<sup>63</sup>
  - b. Crime committed entirely abroad: a corporation headquartered in Italy can be called upon to appear before an Italian court if the crime was committed in its interest or to its benefit, under the conditions indicated in art 4 L.D. 231/2001, i.e.:
    - i. if, based on art 7, 8, 9, 10 there is jurisdiction with regard to the perpetrator (physical person);
    - ii. if the corporation is headquartered in Italy;
    - iii. if the State in which the crime was committed has not already prosecuted the corporation;
    - iv. for certain types of crime, if there is a request from the Minister of Justice.<sup>64</sup>
  - c. Crime committed entirely abroad within a foreign corporation controlled by a parent company located in Italy: the company located in Italy will be held responsible (under the conditions outlined in point b) only if it can be proven that an employee or representative of the corporation took part in the offence committed abroad.<sup>65</sup>

With reference to the implementation of the *Ruggie Principles*<sup>66</sup> (and the related subject of promoting an ethic of respect for human rights), it is widely debated in Italy: businesses, NGOs with the mission of defending and promoting human dignity, consumer rights

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<sup>62</sup> Trib. Milano (G.i.p.), 23 April 2009, in *Foro ambr.*, 2009, p. 358; Trib. riesame Milano, 28 October 2004, Siemens, in *Corr. Merito*, 2005, 319, according to which the criterion that determines the competence (and jurisdiction) to rule on CAR is the place where the crime was committed, not where the administrative offence was committed.

<sup>63</sup> See para 1.3.

<sup>64</sup> Trib. Milano (G.i.p.), 17 November 2009, ENI-Saipem, confirmed by Trib. Riesame Milano, 19 January 2010, in *Foro Ambr.*, 2010, 85.

<sup>65</sup> Scarcella A, 'La internazionalizzazione della responsabilita' da reato degli enti' (2016) para 6 *Rivista231* <<http://www.rivista231.it/>> accessed September 30, 2017.

<sup>66</sup> UN Guiding principles on Business and Human Rights, <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> accessed 30 September 30 2017.

associations and media are discussing potential guidelines and action plans to promote human rights and corporate social responsibility (CSR).

In order to comply with the *Ruggie Principles* and EU law, the Ministry of Foreign Affairs, the Ministry for Economic Development, other Ministries and public administrations (both at an intergovernmental level and in cooperation with business associations and research centres) are designing, have developed or are promoting various tools to facilitate the process for businesses to adapt to human rights. Among these are the National Action Plan (NAP) 2016- 2021, on 'Guiding Principles on Business and Human Rights', 1 December 2016. The plan was open to public consultation, which was attended by various NGOs and business associations.

The NAP, with reference to Guiding Principle no. 25 of *Ruggie Principles* (the States must take measures aimed at guaranteeing the effectiveness of the national legal procedures for responding to human rights abuses connected to businesses, also taking into account methods for reducing legal, practical and other barriers that can prevent access to compensation measures) states that:

- With regard to human rights violations by corporations, the Government must guarantee that victims can exercise their right to access an effective legal remedy before an impartial and independent authority appointed by law.
- With regard to criminal law, the Italian legal system generally applies the territoriality principle as a limit to effectiveness within Italian law; there are some exceptions with reference to criminal conduct or offences against universal values, such as genocide, slavery and terrorism. In particular, article 7 of the Criminal Code provides a universal definition, establishing that for certain types of conduct or crimes criminal law can be applied even if the crime was committed entirely abroad (i.e. outside the national borders), either by an Italian or foreign national. This provision is referenced in Law 231 on CAR: article 4 of Law 231 states that, for cases that fall into the scope of application of article 7 of the Criminal Code, a corporation headquartered within the State territory is held responsible even in relation to crimes committed abroad, if the State in which the offence took place is not already prosecuting the corporation.
- With the aim of raising awareness of the available remedies, improving the efficiency of the legal system and guaranteeing the right to access legal remedies, Italy is committed to taking various measures, among which is setting up a work group under the responsibility of the Ministry of Justice with the task of:
- conducting a survey of the national regulatory framework on corporations' responsibility in the area of human rights, on available remedies and subsequently issuing practical guidelines;
- identifying any gaps or barriers that prevent, or in any way render not entirely effective, access to legal remedies for the victims of abuses connected to corporations' activities, especially with regard to violations involving extraterritoriality, also based on the relation between parent and daughter company;

- evaluating the introduction of legislative measures or the reform of those currently in force to improve access to an effective remedy in the fields of civil, criminal and administrative law.

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# RUSSIAN REPORT ON PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW

*By Gleb Bogush and Vitaly Beloborodov\**

## 1 Core legislation and debate on corporate criminal responsibility in Russia

Russia is a country where dogmatic considerations deter establishment of *corporate criminal responsibility (CCR)*, which has a great impact on procedural and jurisdictional framework for liability of legal persons.

Two areas of Russian law are relevant to the discussion of CCR: criminal law and law of administrative offences. Criminal law is codified in the 1996 Criminal Code of the Russian Federation. In accordance with the principle of full codification envisaged in article 1 of the Code, new substantive criminal legislation is enacted in the form of amendments to the Code. The expression 'the criminal law' (*уголовный закон*) is used interchangeably with 'the Criminal Code' in Russian jurisprudence.

Article 19 of the Code provides that 'Only a mentally capable natural person who has reached the statutory age set by this Code shall be subject to criminal liability', making it impossible to hold corporations criminally liable. The idea of CCR had been consistently rejected in the Russian criminal law doctrine until it was first seriously discussed during the drafting of the 1996 Criminal Code.<sup>1</sup> Although it was dismissed at the time, the idea still lives and the debate is ongoing.

In recent years, the driving force behind the debate has been the Investigative Committee of the Russian Federation, the primary body in charge of criminal investigations. In 2011, the Committee produced a draft law establishing CCR. The document exposed serious shortcomings and faced heavy criticism, but managed to reinvigorate the discussion of CCR. In 2015, a bill on the establishment of CCR, drafted by the Committee, was introduced to the State Duma. The bill failed to gain a widespread support and the legislative efforts stalled. The Government and the Supreme Court refused to lend their support in their official comments, characterizing the bill as introducing 'cardinal' and 'systemic' changes and needing further 'theoretical substantiation' and 'comprehensive discussion'.<sup>2</sup>

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<sup>1</sup> Крылова Н.Е., Уголовная ответственность юридических лиц (корпораций): сравнительно-правовой анализ // *Взаимодействие международного и сравнительного уголовного права* / ред. Комиссаров В.С. М., 2009. С. 75-83.

<sup>2</sup> The text of the bill and the relevant documents are available on the official website of the State Duma (in Russian): Законопроект № 750443-6 О внесении изменений в некоторые законодательные акты Российской Федерации в связи с введением института уголовной ответственности юридических лиц <[http://asozd.duma.govru/main.nsf/\(Spravka\)?OpenAgent&RN=750443-6](http://asozd.duma.govru/main.nsf/(Spravka)?OpenAgent&RN=750443-6)> accessed 8 October 2017

The apparent majority of Russian criminal law scholars rejects the idea of CCR. First, those opposing CCR focus on the concept of guilt (*вина*), an essential mental element of all crimes under Russian criminal law,<sup>3</sup> whereby a legal entity cannot be held truly 'guilty'. In the doctrine, guilt is defined as 'the mental attitude' (*психическое отношение*) of the person committing a crime towards the underlying act. The concept of strict (vicarious) liability is absent from Russian criminal law. It is argued that introduction of CCR would equate the criminal law concept of guilt with the civil law concept of fault and effectively erase the difference between intent and negligence as the two forms of guilt, which in turn would result in an inability to differentiate between various kinds of crimes and personalize punishments.<sup>4</sup> Second, the 'ricochet' model, allowing for CCR on the basis of acts committed by natural persons, is viewed as undermining the principle of personal responsibility (*принцип личной ответственности*) deeply rooted in Russian criminal law and enshrined today in article 5 of the Criminal Code.<sup>5</sup> Third, it is argued that criminal punishments carry with them a moral reproach and an element of stigmatization, meaningless in the context of corporate responsibility.<sup>6</sup>

The law of administrative offences, expressly providing for 'administrative liability' of legal persons,<sup>7</sup> is regarded as an adequate instrument to address illicit corporate conduct, in addition to claims under civil law.<sup>8</sup> Compared to criminal law, the law of administrative offences generally deals with less serious violations, involves a simplified procedure, and provides for generally milder punishments. Its primary source on the federal level is the *2001 Code of Administrative Offences (CAO)*.

A necessary precondition for corporate liability under the CAO is guilt. According to the CAO, a corporation is deemed guilty, if it was possible for it to comply with the law but it did not undertake all possible measures (*все зависящие от него меры*) to ensure compliance.<sup>9</sup> The Code provides that 'Imposition of an administrative punishment on a legal person does not exclude administrative liability of a guilty natural person' and that 'holding a natural person administratively or criminally liable does not exclude administrative liability of a corporation for the corresponding offence'.<sup>10</sup>

The CAO establishes corporate responsibility for a wide variety of offences, although the core international crimes and other grave human rights violations are not penalized as such.

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<sup>3</sup> Уголовный кодекс Российской Федерации от 13.06.1996 N 63-ФЗ (ред. от 29.07.2017). Ст. 14.

<sup>4</sup> Крылова Н.Е., Концептуальные проблемы введения института уголовной ответственности юридических лиц в Российской Федерации // *Уголовно-правовое воздействие в отношении юридических лиц: материалы российско-немецкого уголовно-правового семинара* / ред. Богуш Г.И. М., 2013.

<sup>5</sup> *ibid.*

<sup>6</sup> Богуш Г.И., К вопросу об уголовной ответственности юридических лиц // *Вестник Московского университета, Серия 11. Право.* 2005, № 4. С. 24.

<sup>7</sup> Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Ст. 2.1, 2.6, 2.10.

<sup>8</sup> Головки Л.В., Уголовная ответственность юридических лиц для России: социальная потребность или институциональная глобализация? // *Закон*, 2015, № 5. С. 136-137.

<sup>9</sup> Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Ч. 2 ст. 2.1.

<sup>10</sup> *ibid* ч. 3 ст. 2.1.

Provisions of the Code penalizing specific offences apply to corporations unless otherwise provided.<sup>11</sup> Thus, corporate responsibility is established for a number of offences traditionally entailing criminal responsibility, such as money laundering,<sup>12</sup> financing of terrorism,<sup>13</sup> and trafficking in children.<sup>14</sup>

Administrative punishments applicable to corporations are warning, administrative fine, confiscation of an instrument or an object of administrative offence, and administrative suspension of operations.<sup>15</sup>

Additionally, in relation to a specifically defined group of crimes, the Criminal Code provides for confiscation of proceeds and instruments of crime upon conviction.<sup>16</sup> Where the perpetrator has transferred proceeds of crime to another natural person or a legal person, the proceeds are subject to confiscation, if that person knew or should have known of their criminal provenance.<sup>17</sup> The said group of crimes includes, *inter alia*, abduction, human trafficking, exacting slave labour, certain instances of murder and infliction of grave mental or bodily harm, and prolonged non-payment of salary, where these crimes are committed for material gain.<sup>18</sup>

## 2 Procedural framework and statistics

Administrative offence proceedings are mainly governed by the CAO. Under the ordinary procedure, proceedings are instituted by an official of an executive authority empowered to compile an administrative offence record (*протокол об административном правонарушении*). The CAO specifies the relevant executive authority for every kind of offence<sup>19</sup> (e.g., most of the traffic offences fall within the competence of the Police). An administrative offence record is compiled immediately or up to two days – or, if an investigation is needed, up to several months – after the executive authority learned that the offence had taken place.<sup>20</sup> The record provides a detailed description of the offence, indicates the provision of the CAO corresponding to the charge, and contains information on the official, the suspected person, and available witnesses, as well as any statements made by the natural person or a corporation suspected, if available, and ‘any information necessary for the examination of the case’.<sup>21</sup>

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<sup>11</sup> *ibid* ст. 2.10.

<sup>12</sup> *ibid* ст. 15.27.

<sup>13</sup> *ibid* ст. 15.27-15.27.1.

<sup>14</sup> *ibid* ст. 6.19.

<sup>15</sup> *ibid* ст. 3.2.

<sup>16</sup> Уголовный кодекс Российской Федерации от 13.06.1996 N 63-ФЗ (ред. от 29.07.2017). Ст. 104.1.

<sup>17</sup> *ibid* ч. 3 ст. 104.1.

<sup>18</sup> *ibid* ч. 1 ст. 104.1.

<sup>19</sup> Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Ст. 28.3.

<sup>20</sup> *ibid* ст. 28.2.

<sup>21</sup> *ibid* ст. 28.2.

Depending on the offence, the case file is then transferred to a court or a non-judicial authority competent to issue a decision in the case as a first instance body.<sup>22</sup> In a narrow category of cases, decisions are issued by the federal *arbitrazh* courts (*арбитражные суды*),<sup>23</sup> a specialized branch of courts designed to resolve economic disputes. The courts of general jurisdiction decide a larger category of cases.<sup>24</sup> Most of the cases are decided by non-judicial authorities.<sup>25</sup>

Court decisions are subject to review by higher courts of the respective branch.<sup>26</sup> In certain cases concerning offences related to 'economic activity', the decision issued by a non-judicial authority can be challenged before an *arbitrazh* court,<sup>27</sup> otherwise it can be challenged before a court of general jurisdiction or a higher non-judicial authority.<sup>28</sup>

The 2002 *Arbitrazh* Procedure Code governs proceedings before the *arbitrazh* courts.<sup>29</sup> Under the Code, the burden of proof lies with the executive authority that transferred the case to the court<sup>30</sup> or issued the decision in the case.<sup>31</sup> The authority acts as a party to the court proceedings.<sup>32</sup>

Proceedings before the courts of general jurisdiction suffer from a structural deficiency of Russian law identified by the European Court of Human Rights in *Karelin v. Russia*.<sup>33</sup> Here, executive authorities do not act as a party to the administrative offence proceedings<sup>34</sup>, which results in a lack of a prosecuting authority and effectively inclines the court to support the charges by, for instance, modifying the charges or summoning witnesses *proprio motu* to cure inconsistencies within the case file. In certain scenarios, it may lead to a breach of fair trial

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<sup>22</sup> *ibid* ст. 28.8.

<sup>23</sup> *ibid* ч. 3 ст. 23.1.

<sup>24</sup> *ibid* ст. 23.1; Постановление Пленума Верховного Суда Российской Федерации «О некоторых вопросах, возникающих у судов при применении Кодекса Российской Федерации об административных правонарушениях» от 24.03.2005 N 5 (ред. от 19.12.2013). П. 3.

<sup>25</sup> Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Ст. 23.2-23.85.

<sup>26</sup> *ibid* п. 1 ч. 1 ст. 30.1.

<sup>27</sup> *ibid* ч. 3 ст. 30.1; Арбитражный процессуальный кодекс Российской Федерации от 24.07.2002 N 95-ФЗ (ред. от 29.07.2017). Ст. 202.

<sup>28</sup> Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Ч. 1 ст. 30.1.

<sup>29</sup> Арбитражный процессуальный кодекс Российской Федерации от 24.07.2002 N 95-ФЗ (ред. от 29.07.2017). Глава 25.

<sup>30</sup> Арбитражный процессуальный кодекс Российской Федерации от 24.07.2002 N 95-ФЗ (ред. от 29.07.2017). Ч. 1 ст. 202, ч. 5 ст. 205, ч. 4 ст. 210.

<sup>31</sup> *ibid* ч. 4 ст. 210.

<sup>32</sup> *ibid* ч. 2 ст. 202, ч. 3-4 ст. 205.

<sup>33</sup> *Karelin v Russia* App no 926/08 (ECtHR, 20 September 2016).

<sup>34</sup> Постановление Пленума Верховного Суда Российской Федерации «О некоторых вопросах, возникающих у судов при применении Кодекса Российской Федерации об административных правонарушениях» от 24.03.2005 N 5 (ред. от 19.12.2013). П. 10.

rights. This issue has been raised before the Constitutional Court,<sup>35</sup> but the Court failed to act decisively.<sup>36</sup> The lack of sufficient procedural safeguards in administrative offence proceedings has been put forward as an argument in favour of corporate criminal liability.<sup>37</sup>

An exception to the ordinary procedure is that administrative proceedings in relation to a number of antitrust offences are instituted only after the competent antitrust authority concludes a prior antitrust proceeding.<sup>38</sup> Antitrust authorities are empowered to undertake a broad range of investigative measures, including on-site examinations and retrieval of documents or information possessed by corporations,<sup>39</sup> powers not always enjoyed by other executive authorities.

Legal persons participate in administrative offence proceedings through natural persons empowered by law to represent them (*законный представитель юридического лица*) (eg, chairman of the board or director-general, depending on the type of the legal person), an attorney (*представитель*), or a defence attorney (*защитник*).

Administrative offence proceedings may be conducted *in absentia* subject to the proper notice requirement.<sup>40</sup> A convicted person is not entitled to retrial upon appearance.

The rules on *in absentia* criminal trials, governed by the 2001 Criminal Procedure Code, are more diversified. A person can be tried *in absentia* and retried upon appearance, only if (1) the case concerns a 'grave' or an 'especially grave' crime, the two most serious categories of crimes under the four-tier categorization in Russian criminal law,<sup>41</sup> (2) the absence of the accused results from the fact that the accused is situated abroad or evaded appearance at trial, and (3) the person has not been convicted in a foreign jurisdiction.<sup>42</sup> With respect to crimes of the two lesser categories, these limitations do not apply and trial *in absentia* is possible at the accused's request, subject to the court's discretion, although retrial upon appearance is not possible.<sup>43</sup>

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<sup>35</sup> See the complaint to the Constitutional Court filed in that case (in Russian): Жалоба на нарушение конституционных прав свобод граждан пунктами 2 и 4 части 1 статьи 29.7 во взаимосвязи с главой 25 Кодекса Российской Федерации об административных правонарушениях <[http://ilpp.ru/netcat\\_files/userfiles/Litigation\\_Treinings/Zhaloba%20v%20X%20RF\\_Astahova%20ot%2022.07.14.pdf](http://ilpp.ru/netcat_files/userfiles/Litigation_Treinings/Zhaloba%20v%20X%20RF_Astahova%20ot%2022.07.14.pdf)> accessed 8 October 2017.

<sup>36</sup> Определение Конституционного Суда Российской Федерации от 25.09.2014 N 2157-О.

<sup>37</sup> Клепицкий И.А., Уголовная ответственность корпораций: «за» и «против» // Уголовно-правовое воздействие в отношении юридических лиц: материалы российско-немецкого уголовно-правового семинара / ред. Богуш Г.И. М., 2013. С. 41-45.

<sup>38</sup> Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Ч. 1.2 ст. 28.1.

<sup>39</sup> Федеральный закон «О защите конкуренции» от 26.07.2006 N 135-ФЗ (ред. от 29.07.2017). Ст. 25-25.4.

<sup>40</sup> Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Ч. 2 ст. 25.1; Арбитражный процессуальный кодекс Российской Федерации от 24.07.2002 N 95-ФЗ (ред. от 29.07.2017). Ч. 3 ст. 205.

<sup>41</sup> Уголовный кодекс Российской Федерации от 13.06.1996 N 63-ФЗ (ред. от 29.07.2017). Ст. 15.

<sup>42</sup> Уголовно-процессуальный кодекс Российской Федерации от 18.12.2001 N 174-ФЗ (ред. от 29.07.2017). Ч. 5, 7 ст. 247.

<sup>43</sup> *ibid* ч. 4 ст. 247.

Russian procedural law boasts broad possibilities for victim participation. In criminal proceedings, victims – defined as natural or legal persons who have suffered a physical, moral, or material harm as a result of the crime – have the right, *inter alia*, to be informed of the charges in the case; study the case file after the pre-trial investigation is completed; present their case in court, testify, and adduce evidence; file motions; seek disqualification of the judge, the official conducting investigation, or the public prosecutor; and challenge decisions issued at both pre-trial and trial stages.<sup>44</sup> A person is declared victim by the official conducting investigation or by the court. Victims have the right to legal representation and enjoy protection from self-incrimination.

In administrative offence proceedings, victims – natural or legal persons who have suffered ‘physical, moral, or material harm’ as a result of the administrative offence – are entitled to study the case file, testify, adduce evidence, file motions, seek disqualification of judges or executive officials, challenge the decision issued in the case, and have legal representation.<sup>45</sup> A victim is provided with a copy of the administrative offence record,<sup>46</sup> notified of the following proceedings,<sup>47</sup> and entitled to a copy of the decision in the case.<sup>48</sup>

The figure of *amicus curiae* is unknown to Russian procedural law, although various persons may *de facto* act as *amici curiae* before the Constitutional Court and the Supreme Court. NGOs do not *per se* enjoy any procedural status. In criminal and administrative offence proceedings, representatives of NGOs may be summoned as witnesses, whereas documents emanating from NGOs may be submitted by the parties to the proceedings.

The Judicial Management Department at the Supreme Court of the Russian Federation (*Судебный департамент при Верховном Суде*) regularly publishes statistics on judicial proceedings in criminal and administrative offence cases.<sup>49</sup> Statistics on first instance administrative offence proceedings before the courts of general jurisdiction detail the number of convicted legal persons and the number of legal persons convicted *in absentia* in a specified annual or biannual period, without, however, indicating the number of convictions for any specific offence under the CAO within these two groups. In 2016, out of 6,362,429 defendants in cases concerning violations of the CAO, 5,379,231 were sentenced, including 216,569 legal persons, with 97,618 legal persons convicted and sentenced in the absence of a representative in court.

Statistics on administrative offence proceedings before the *arbitrazh* courts do not detail the number of natural and legal persons convicted, but differentiate between the number of cases decided by the *arbitrazh* courts acting as a judicial authority competent to decide cases

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<sup>44</sup> *ibid* ст. 42.

<sup>45</sup> Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Ч. 1-2 ст. 25.2.

<sup>46</sup> *ibid* ч. 6 ст. 28.2.

<sup>47</sup> *ibid* ч. 1 ст. 29.4, ч. 1 ст. 29.7.

<sup>48</sup> *ibid* ч. 2 ст. 29.11.

<sup>49</sup> Judicial statistics for 2016 are available on the official website of the Judicial Management Department (in Russian): Данные судебной статистики <<http://www.cdep.ru/index.php?id=79&pg=0>> accessed 8 October 2017.

on administrative offences (in 2016, 50,778 cases in the first instance courts; 40,360 convictions), and the number of cases where decisions were issued by non-judicial authorities and subsequently reviewed by *arbitrazh* courts (47,210 such cases were decided by lower *arbitrazh* courts in 2016; the courts ruled in favour of the applicants in 16,433 of them). In the latter group, the number of cases is further detailed in relation to each competent non-judicial authority.

The statistics do not show the number of cases concerning extraterritorial activities.

### 3 Jurisdictional framework

The jurisdictional framework also differs considerably between criminal and administrative offence proceedings.

Russian legislation and judicial decisions do not provide a definition of jurisdiction. The legislation employs the term 'limits of application' (and, more rarely, 'relations governed by the statute' or 'sphere of application'), while the term 'jurisdiction' (*юрисдикция*) is rarely used in Russian legal texts in the sense discussed here. Most frequently, it is used in a procedural sense to denote territorial and substantive competence of courts, administrative agencies, and other official bodies within the legal system. The primary branch of Russian judiciary is called 'courts of general jurisdiction' (*суды общей юрисдикции*), meaning these courts lack any field of specialization and decide cases on a broad range of issues.

Russian international law doctrine has long recognized that the underlying idea behind the principles of legislative jurisdiction is the existence of some link between the state and the conduct it seeks to govern.<sup>50</sup> It is also recognized that jurisdiction must be exercised in compliance with international law, which is particularly important, given that under article 15, paragraph 4 of the Russian Constitution, international law constitutes an integral part of Russian legal system and takes precedence over national laws. The wording of this article is flawed in that it only establishes precedence of international treaties and does not expressly address customary international law. At the same time, though, application of customary international law by Russian courts is nearly non-existent.

Rules on jurisdiction are rigid under Russian law. No standard of jurisdiction akin to a standard of 'jurisdictional reasonableness' or balancing of interests is established. Procedural law does not provide for a possibility to refuse institution of proceedings, withdraw charges, or terminate proceedings on the sole ground that a foreign state possesses jurisdiction over the case. Russian law adheres much more to the *legalité des poursuites* approach as opposed to *opportunité des poursuites*.

Generally, the courts place the burden to establish jurisdictional grounds on the prosecuting authority.<sup>51</sup>

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<sup>50</sup> Мартенс Ф.Ф., Современное международное право цивилизованных народов. Т. 2. Издание 4. СПб, 1900. С. 398.

<sup>51</sup> eg, Постановление Арбитражного суда Поволжского округа от 25 сентября 2009 г. по делу N А06-2635/2009; Приговор Кировского районного суда г. Самары от 29 марта 2016 г. по делу N 1-180/2016.

In accordance with Russian legal tradition, almost every code (e.g., Labor Code, Tax Code) and major statute central to a branch of law (e.g., Federal Law on Education, Federal Law on Mass Media) contain general provisions on jurisdiction establishing its 'limits of application' (*пределы действия*). These limits are usually determined *ratione temporis* and *ratione loci* or *ratione personae*. Specific provisions on the territorial ambit of a particular rule or a certain part of a statute are a rare exception.

The Criminal Code utilizes a wide variety of principles of jurisdiction, notably passive personality principle in one of its broadest forms and the treaty-based principle of universal jurisdiction.<sup>52</sup> Other branches of law, however, employ limited jurisdictional grounds. The CAO recognizes protective principle to a very limited extent and employs no other principles of extraterritorial jurisdiction, except those prescribed by applicable international treaties, which makes it impossible to hold corporations accountable for a broad spectrum of extraterritorial activities.

The principle of jurisdiction established both in the CAO and in the Criminal Code is the territorial principle. The territorial principle has been traditionally rationalized as flowing from national sovereignty. Additionally, it has been justified on the basis of evidentiary concerns, a 'presumption that crimes affect the interests of the states in which they are committed',<sup>53</sup> and a common 'sense of justice' pertaining to members of a nation.<sup>54</sup>

Russia is a party to several international conventions imposing obligations to establish criminal jurisdiction over certain offences 'committed in whole or in part in its territory'.<sup>55</sup>

The Criminal Code provides that 'Any person who has committed a crime in the territory of the Russian Federation is subject to criminal liability under this Code'.<sup>56</sup> The CAO contains an almost identical provision with respect to administrative offences.<sup>57</sup> The codes do not stipulate when an offence shall be considered committed within the territory of a state.

Commentators advance various interpretations ranging from the most restrictive approach that requires the offence to be wholly committed within the territory; through the traditional acts-based, consequences-based, or a combined 'ubiquity' approaches; to the most expansive 'initiated, continued, or completed' test. The latter is typical for criminal codes of post-soviet countries and merits consideration.

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<sup>52</sup> Уголовный кодекс Российской Федерации от 13.06.1996 N 63-ФЗ (ред. от 29.07.2017). Ст. 12.

<sup>53</sup> Бойцов А.И., Уголовный закон // *Уголовное право России: Общая часть* / под ред. Н.М. Кропачева, Б.В. Волженкина, В.В. Орехова. СПб, 2006. С. 265.

<sup>54</sup> Таганцев Н.С., Уголовное уложение 22 марта 1903 года. Статьи, введённые в действие. СПб, 1911. С. 10.

<sup>55</sup> Criminal Law Convention on Corruption (adopted 27 January 1999, entered into force 1 July 2002) 173 ETS art 17 para 1; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted by the Negotiating Conference on 21 November 1997, signed 17 December 1997, entered into force 15 February 1999) (OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions) art 4 para 1.

<sup>56</sup> Уголовный кодекс Российской Федерации от 13.06.1996 N 63-ФЗ (ред. от 29.07.2017). Ст. 11.

<sup>57</sup> Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Ст. 1.8.

In 1994, Uzbekistan, first in the post-soviet era, adopted a new criminal code that established territorial jurisdiction over all crimes ‘initiated, completed, or terminated’ (*начато, окончено или прервано*) within the territory of the state. In 1996, a similar formula ‘initiated, continued, or completed’ (*начато, или продолжилось, или было окончено*) was utilized in the Model Criminal Code for the Member States of the Commonwealth of Independent States,<sup>58</sup> a model statute designed under the auspices of the Interparliamentary Assembly of the Commonwealth of Independent States with a view to provide guidance for the post-soviet countries in the age of reforms. The intent of the drafters was to broaden the traditional subjective-objective (ubiquity) approach.<sup>59</sup> To this end, the Model Code also establishes jurisdiction over the acts of all the accomplices where just one of them acted in the territory of the state.

In the Uzbekistani code, a separate provision deals with the issue of jurisdiction over continuous crimes (*продолжаемые преступления*). Under the Russian theory of *concursum delictorum*, multiple instances of a systematic criminal activity unified by a common intent are regarded as a single continuous crime (subject to statutory definition of the crime). Individually, these instances may not even reach the level of criminality due to insignificance of harm inflicted, but entail criminal responsibility in combination. The ‘continued’ element of the Model Code formula establishes jurisdiction over the whole continuous offence where any one of the constituting instances takes place in the territory of the state.

It is unclear whether it was possible for the Russian legislature to follow or deliberately reject the approach used in the Model Code in the course of the drafting of the Russian Criminal Code in 1996.

In 2001, the Supreme Court held, *obiter*, that ‘Within the meaning of the criminal law, the crime shall be considered committed in the place where the underlying acts were completed, regardless of the place where the consequences occurred’. This holding was deemed significant enough to be reported in the official Supreme Court periodical.<sup>60</sup> It was reiterated, also *obiter*, by a regional court in 2004.<sup>61</sup>

In 2012, a regional court held that a crime shall be considered committed within the Russian territory, if one of the physical actions constituting the ‘act’ element of the crime (*деяние*) has been committed in Russia.<sup>62</sup>

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<sup>58</sup> The text of the Model Criminal Code (in Russian) is available in Волженкин Б.В., Пояснительная записка к Модельному Уголовному кодексу для государств – участников Содружества Независимых Государств // Известия высших учебных заведений. Правоведение. 1996, № 1. С. 93.

<sup>59</sup> Волженкин Б.В., Модельный уголовный кодекс и его влияние на формирование уголовного законодательства государств – участников Содружества Независимых Государств // Новое уголовное законодательство стран СНГ и Балтии / под ред. Л.Л. Кругликова. М, 2002. С. 14.

<sup>60</sup> Бюллетень Верховного Суда Российской Федерации, 2001, N 10. С. 19.

<sup>61</sup> Постановление президиума Челябинского областного суда от 2.06.2004, надзорное производство N 4у-2004-211.

<sup>62</sup> Постановление Московского городского суда от 25.06.2012 N 4у/4-4809.

These pronouncements favour the act-based, subjective territoriality approach. In 1998, however, the Supreme Court did not quash a conviction for complicity in murder in a case where the accused, acting from abroad, abetted two other persons to kill the victim in the territory of the Russian Federation.<sup>63</sup> The Court could not rely on anything other than the territorial principle, since the accused lacked Russian citizenship, and the applicable law at the material time did not provide for the passive personality principle. Thus, overall, the existing practice tends to support the combined subjective-objective approach.

The provision of the CAO establishing territorial jurisdiction is also interpreted broadly. According to the 2006 Federal Law on Protection of Competition, as amended, Russian antitrust law is applicable to any agreements made or actions taken outside of the Russian territory that 'affect competition' (*оказывают влияние на состояние конкуренции*) within the Russian Federation.<sup>64</sup> The Federal Law on Protection of Competition does not itself provide for administrative fines, but a finding of a violation thereof is a prerequisite for institution of administrative offence proceedings.<sup>65</sup> The broad wording of the Federal Law has not thus far resulted in any case concerning an anticompetitive behaviour too far remotely connected with Russia. It has been applied by the Federal Antimonopoly Service (FAS), the official antitrust authority, to foreign corporations that entered anticompetitive agreements concerning products intended for import. The recent example is the case of Google Inc. which was fined 438 million Rubles (roughly 7 million US dollars) for abuse of a dominant market position. In that case, the FAS interpreted article 1.8 of the CAO in the context of the Federal Law On Protection of Competition as allowing to punish Google Inc. for entering anticompetitive agreements that prevented mobile phones manufacturers (although the publicly available documents do not disclose the identities of the manufacturers, the media reported them to be Fly, Explay, and Prestigio,<sup>66</sup> with only Explay being incorporated in Russia) from preinstalling competing software applications on mobile phones intended for distribution and sale in Russia.<sup>67</sup>

Russian criminal law maintains a distinction between conduct crimes (*преступления с формальным составом*) and result crimes (*преступления с материальным составом*). Due to 'thick walls' existing between various branches of law in Russian legal thinking, particularly between criminal and antitrust law, the 'effects-based' approach is not often discussed in the Russian criminal law doctrine, and what is understood, by default, under the consequences-based (objective territoriality) approach is a test focused on consequences that form an element of the offence. Where objective territoriality is seen as focusing on

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<sup>63</sup> Бюллетень Верховного Суда Российской Федерации, 1998, N 9. С. 4-5.

<sup>64</sup> Федеральный закон «О защите конкуренции» от 26.07.2006 N 135-ФЗ (ред. от 29.07.2017). Ст. 3

<sup>65</sup> Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Ч. 1.2 ст. 28.1.

<sup>66</sup> eg 'Google vs ФАС: борьба за мир' <<https://legal.report/article/google-vs-fas-borba-za-mir>> accessed 8 October 2017.

<sup>67</sup> Постановление Федеральной антимонопольной службы о наложении штрафа по делу об административном правонарушении N 4-14.31-6/00-11-16 от 11.08.2016 <<http://solutions.fas.gov.ru/ca/pravovoe-upravlenie/ad-55539-16>> accessed 8 October 2017.

consequences that do not necessarily constitute an element of the offence,<sup>68</sup> the minimum scope of consequences sufficient to trigger the jurisdiction is not defined. Neither Russian doctrine, nor jurisprudence of the courts allow one to discern a clear standard in this regard. Given that the said distinction can serve as a mere tool for the legislature to weaken or strengthen criminal repression of a particular conduct, a strong incentive exists to extend territorial jurisdiction focusing on consequences occurring after the 'completion' of the offence.

Various principles of extraterritorial jurisdiction established in national laws and applicable international treaties complement the territorial principle. Extraterritorial jurisdiction has been linked to convergence of states in the fight against criminality and intensification of international relations. It enables a more complete protection of national, foreign and universal interests. To the extent extraterritorial jurisdiction results in protection of foreign interests, it is based on expectations of mutuality from foreign nations.<sup>69</sup> It has also been said to allow states to maintain prestige of their legal orders abroad.<sup>70</sup>

There is no general principle of interpretation of statutes akin to a presumption against extraterritoriality in contemporary Russian criminal law. This corresponds to how jurisdiction is spelled out in statutes – the burden is not on the judiciary to come up with a background against which the legislature can legislate, but on the legislature to determine the limits of application of statutes. This also corresponds to the fact that Russian judges engage in interpretation of statutes somewhat less proactively than their foreign counterparts. This does not preclude modification of the material scope of penal laws by way of changing the statutory definitions of the offences, for example, through introducing a provision to the effect that bribery of foreign officials does entail criminal or administrative responsibility under Russian law, as was the case with articles 290-290.1 of the Criminal Code and article 19.28 of the CAO, amended accordingly in 2011.

The active personality principle of jurisdiction has been justified on the basis of mutual rights and duties between the state and its subjects, particularly the right to patronage belonging to citizens abroad, enshrined today in article 61 of the Russian Constitution. The Criminal Code provides:

Russian citizens and stateless persons permanently residing in the Russian Federation, who committed a crime outside of the Russian Federation ..., are subject to criminal liability under this Code, if no court decisions have been issued against them in a foreign state in relation to the crime.<sup>71</sup>

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<sup>68</sup> Бойцов А.И., *Выдача преступников*. СПб, 2004. С. 255.

<sup>69</sup> Е.г., Спасович В.Д., *Учебник уголовного права*. Том I. СПб, 1863. С. 75.

<sup>70</sup> Маргенс Ф.Ф., *Современное международное право цивилизованных народов*. Т. 2. Издание 4. СПб, 1900. С. 396-397.

<sup>71</sup> Уголовный кодекс Российской Федерации от 13.06.1996 N 63-ФЗ (ред. от 29.07.2017). Ч. 1 ст. 12.

Under immigration law, the status of a person permanently residing in the Russian Federation can be acquired by those who have resided in Russia for at least a year.<sup>72</sup>

Until 2006, extraterritorial jurisdiction based on the active personality principle was limited by the dual criminality requirement, as well as the requirement to decrease the applicable penalty range where *lex loci* provided for a lesser maximum penalty.

Since the CAO does not provide for the active personality principle, the principle does not apply to corporations under Russian law.

The Criminal Code contains a separate provision governing jurisdiction over Russian military personnel. It provides that Russian military personnel deployed abroad are subject to criminal liability for crimes committed in foreign territories, unless otherwise provided by an applicable international treaty.<sup>73</sup> The Code does not refer to private military contractors.

The passive personality principle was introduced to the Criminal Code in 2006. It applies to any crime committed against a Russian citizen or a stateless person permanently residing in the Russian Federation, where the perpetrator has not been convicted in a foreign state.<sup>74</sup> The CAO does not provide for the passive personality principle, and thus, the principle does not apply to corporations.

The Criminal Code also provides for the protective principle, establishing jurisdiction over crimes committed 'against the interests of the Russian Federation', subject to the requirement of the lack of a foreign conviction.<sup>75</sup> The protective principle emerged in reaction to the reluctance of states to criminalize activities directed against the interests of foreign nations in their domestic laws.<sup>76</sup> Amending the laws to fully protect foreign interests was once seen as a viable alternative to introduction of the protective principle.<sup>77</sup>

The protective principle mirrors the passive personality principle and applies to all crimes committed against the interests of the state. In practice, it has been applied to prosecute theft of weaponry stored at a Russian military compound located abroad,<sup>78</sup> fraud against a state-owned corporation,<sup>79</sup> and possession of narcotic or dangerous substances intended for distribution in the Russian territory.<sup>80</sup> In a case where drugs intended for personal consumption had been acquired abroad and illegally transported into Russian territory by a foreign national, which resulted in a conviction for smuggling of narcotic substances, the

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<sup>72</sup> Федеральный закон «О правовом положении иностранных граждан в Российской Федерации» от 25.07.2002 N 115-ФЗ (ред. от 29.07.2017). Ч. 2 ст. 8.

<sup>73</sup> Уголовный кодекс Российской Федерации от 13.06.1996 N 63-ФЗ (ред. от 29.07.2017). Ч. 2 ст. 12.

<sup>74</sup> *ibid* ч. 3 ст. 12.

<sup>75</sup> *ibid*.

<sup>76</sup> Лист Ф., Учебник уголовного права: Общая часть. 1903. С. 104.

<sup>77</sup> Спасович В.Д., Учебник уголовного права. Том I. 1863. С. 76, 80.

<sup>78</sup> Бюллетень Верховного Суда Российской Федерации, 1998 N 9. С. 4-5.

<sup>79</sup> Апелляционное определение Московского городского суда от 01.10.2015 N 10-12470/2014.

<sup>80</sup> Постановление Московского городского суда от 08.09.2016 N 4у-4193/2016.

prosecution for acquisition and possession was terminated on the ground that they had not encroached upon 'the interests of the Russian Federation'.<sup>81</sup>

The CAO expressly provides for only one case of jurisdiction based on the protective principle:

A legal person that committed the administrative offence provided for by article 19.28 outside of the Russian Federation is subject to administrative liability under the present Code, if it is provided for by an international treaty to which the Russian Federation is a party or the offence is committed against the interests of the Russian Federation, and the legal person has not been held criminally or administratively liable in a foreign state.<sup>82</sup>

The offence under article 19.28 is the offence of illicit gratification provided on behalf of or in the interests of a legal person to a public official, a foreign public official, an official of a public international organization, or an official in a private commercial organization.

The Criminal Code and the CAO contain separate blanket provisions that expressly broaden the jurisdiction to the extent provided for by applicable international treaties.<sup>83</sup> It is only through these provisions that Russian criminal law allows to exercise universal jurisdiction.

Under the Criminal Code, universal jurisdiction applies only to foreign nationals and stateless persons not residing permanently within the territory of the Russian Federation and, in this sense, it may be considered subsidiary to other jurisdictional principles. Universal jurisdiction is subject to the same limitations as the passive personality and protective principles: a conviction in a foreign state precludes prosecution in Russia. Interestingly, a conviction in a foreign state does not preclude the exercise of treaty-based jurisdiction under the CAO.

In practice, universal jurisdiction is rarely exercised. The only conviction to date is the prominent *Arctic Sea* case concerning piracy. In that case, a lower court expressly relied on article 105 of the 1982 United Nations Convention on the Law of the Sea to establish jurisdiction and rejected the argument of the defence that the commission of the crime in Swedish territorial waters conferred primary jurisdiction over the crime upon Sweden.<sup>84</sup> Later, the Supreme Court rejected this argument on factual grounds.<sup>85</sup> The Investigative Committee of the Russian Federation has instituted several proceedings in relation to the 2008 *South Ossetian* conflict that may be based on the universality principle, but these proceedings have not reached the trial phase.

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<sup>81</sup> Приговор Волгоградского областного суда от 28.04.2015 по делу N 2-9/2015.

<sup>82</sup> Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Ч. 3 ст. 1.8.

<sup>83</sup> Уголовный кодекс Российской Федерации от 13.06.1996 N 63-ФЗ (ред. от 29.07.2017). Ч. 3 ст. 12; Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). ч. 2 ст. 1.8.

<sup>84</sup> Кассационное определение Московского городского суда от 13.09.2010 N 22-11920.

<sup>85</sup> Кассационное определение Верховного Суда Российской Федерации от 22.06.2011 по делу № 1-О11-20.

#### 4 International *ne bis in idem* and interlocal jurisdictional conflicts

On the one hand, Russian criminal law is fairly expansive in terms of extraterritorial jurisdiction. Principles of extraterritorial criminal jurisdiction are not limited to any specific offences, whereas the dual criminality requirement, previously limiting active personality jurisdiction, was abolished in 2006. On the other hand, extraterritorial criminal jurisdiction is heavily affected by the *ne bis in idem* principle, affording individuals with much more potent protections from prosecution than it is required under international law.

The *ne bis in idem* principle enjoys constitutional status in Russian law<sup>86</sup> and applies to a wide range of penal and quasi-penal sanctions,<sup>87</sup> including administrative punishments.<sup>88</sup> Pursuant to the Criminal Code, a prior conviction in a foreign state precludes the possibility to exercise extraterritorial criminal jurisdiction. It is of note that, while the provision on the active personality principle speaks of a prior ‘court decision’, the provisions on protective, passive personality, and universality principles speak of a ‘conviction’ in a foreign jurisdiction, meaning that an acquittal in a foreign court would not preclude prosecution.

Cumulative convictions for the same conduct (‘ideal concurrence’, ‘идеальная совокупность’) are possible, provided that the legal definition of one offence is not fully subsumed by the other, that is where the definitions do not form a *lex specialis – lex generalis* relationship.

There can be no intranational (interlocal) jurisdictional conflicts in criminal matters, since criminal law and criminal procedure fall within the exclusive legislative competence of the Federal authorities.<sup>89</sup>

According to the Constitutional Court, criminalization of a conduct that already constitutes an administrative offence – without amending the law to abolish administrative liability – would be regarded as unconstitutional as far as the legal definitions of the crime and the corresponding administrative offence are materially the same.<sup>90</sup> Likewise, where there is an irreconcilable contradiction between two valid legislative provisions, the provision more favourable to an individual controls.<sup>91</sup> This principle applies, particularly, where a federal statute authorizes a conduct that would otherwise constitute a crime under the Criminal Code.<sup>92</sup> It flows from the rationale that criminal law serves as a measure of the last resort in governing the society (the *ultima ratio* principle), an idea recognized in the jurisprudence of the Constitutional Court.<sup>93</sup>

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<sup>86</sup> Конституция Российской Федерации (принята всенародным голосованием 12.12.1993). Ст. 50.

<sup>87</sup> Определение Конституционного Суда Российской Федерации от 5.07.2001 N 130-О; Постановление Конституционного Суда Российской Федерации от 18.07.2008 N 10-П.

<sup>88</sup> Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Ч. 5 ст. 4.1.

<sup>89</sup> Конституция Российской Федерации (принята всенародным голосованием 12.12.1993). Ст. 71.

<sup>90</sup> Постановление Конституционного Суда Российской Федерации от 27.05.2008 N 8-П.

<sup>91</sup> Определение Конституционного Суда Российской Федерации от 8.11.2005 N 439-О.

<sup>92</sup> Постановление Конституционного Суда Российской Федерации от 27.05.2008 N 8-П.

<sup>93</sup> *ibid.*

Law of administrative offences, in contrast, falls within the 'shared competence' (*совместное ведение*) of the Federation and its constituent members,<sup>94</sup> meaning that the constituent members of the Russian Federation may provide for administrative liability in their local laws. In practice, however, their power is fairly limited. First, within the field of the shared competence, federal legislation enjoys supremacy over that of the constituent members.<sup>95</sup> Thus, according to the jurisprudence of the Supreme Court, where a particular conduct has been prohibited at the federal level, constituent members may not duplicate the prohibition in their administrative laws.<sup>96</sup> Second, pursuant to the CAO, administrative laws of the constituent members shall not penalize violations of federal laws and regulations.<sup>97</sup> To determine whether a local administrative prohibition duplicates a federal one or penalizes a violation of a federal rule, the courts look beyond the wording of the provision and analyse the *actus reus* of the offence along with its 'object' (protected interest) in light of the relevant federal legislation.<sup>98</sup>

Conflicts of jurisdiction between constituent members are *de facto* prevented through delimitation of competence between territorial units of the executive authorities empowered to carry out administrative proceedings. In most cases, territorial competence of the relevant unit never transgresses the borders of the constituent members of the Federation, giving no rise to jurisdictional conflicts. According to the CAO, unless the offence has been committed abroad, the case is investigated and examined where the offence was committed.<sup>99</sup> Interpreting this provision, the Supreme Court has ruled that for the purposes of delimitation of competence between various territorial units an offence is deemed committed where the underlying act or omission took place, regardless of the place where the consequences were felt.<sup>100</sup> Further, an offence of a 'continuing nature' is deemed committed in the territory where the underlying activity was completed or terminated; an offence perpetrated through omission is deemed committed in the place where the perpetrator has had to act or to fulfil obligation.<sup>101</sup> Since this provision also applies to proceedings instituted under laws of the constituent members, this pronouncement by the Supreme Court effectively resolves most of jurisdictional conflicts between them, at least from the procedural standpoint. From the material standpoint, the choice of law issue should not arise, since the bodies empowered by the local laws to investigate and decide

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<sup>94</sup> Конституция Российской Федерации (принята всенародным голосованием 12.12.1993). Ст. 72.

<sup>95</sup> *ibid* ст. 76.

<sup>96</sup> *eg*, Определение Верховного Суда Российской Федерации от 27.02.2013 N 46-АПГ13-2; Определение Верховного Суда Российской Федерации от 15.02.2012 N 25-Г12-2.

<sup>97</sup> Постановление Пленума Верховного Суда «О некоторых вопросах, возникающих у судов при применении Кодекса Российской Федерации об административных правонарушениях» от 24.03.2005 N 5 (ред. от 19.12.2013). П. 1.

<sup>98</sup> Определение Верховного Суда Российской Федерации от 14.05.2014 N 55-АПГ14-5.

<sup>99</sup> Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Ст. 29.5.

<sup>100</sup> Постановление Пленума Верховного Суда Российской Федерации «О некоторых вопросах, возникающих у судов при применении Кодекса Российской Федерации об административных правонарушениях» от 24.03.2005 N 5 (ред. от 19.12.2013). П. 3.

<sup>101</sup> *ibid*.

cases are created and funded by the governments of the respective constituent members, and are in most cases unauthorized to apply laws and regulations of other constituent members.

The CAO provides for mandatory termination of proceedings where, in relation to the same facts, there exists a prior decision that has imposed administrative liability or terminated proceedings concerning the same (or in some cases, nearly the same) legal characterization of an administrative offence within the framework of the CAO or a local law.<sup>102</sup> A similar provision is contained in the Criminal Procedure Code.<sup>103</sup> Institution of proceedings, whether administrative or criminal, does not preclude filing of tort claims.

## 5 Interstate legal assistance

Russia is a party to many bilateral and multilateral international treaties governing interstate legal assistance in criminal matters,<sup>104</sup> including the issues of extradition and production of evidence. The primary example is the 1993 Minsk Convention regulating legal assistance between Russia and 11 other post-soviet countries. Both the Criminal Procedure Code and the CAO contain chapters on interstate legal assistance.<sup>105</sup> Under these codes, extradition and production of evidence are carried out on the basis of either an international treaty or reciprocity. In most cases, the official body designated to engage in interstate legal assistance on behalf of Russia is the Prosecutor General's Office of the Russian Federation (*Генеральная прокуратура Российской Федерации*).

The codes provide that evidence produced through legal assistance mechanisms enjoy the same status as evidence obtained lawfully in the territory of the Russian Federation.<sup>106</sup> This is particularly relevant in the context of the constitutional principle of inadmissibility of illegally obtained evidence.<sup>107</sup>

Due to the generally recognized approach to extraditable offences reflected in articles 460 and 462 of the Criminal Procedure Code, extradition is impossible in administrative offence

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<sup>102</sup> Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). П. 7 ч. 1 ст. 24.5, ч. 2 ст. 29.4.

<sup>103</sup> Уголовно-процессуальный кодекс Российской Федерации от 18.12.2001 N 174-ФЗ (ред. от 29.07.2017). П. 4-5 ч. 1 ст. 27.

<sup>104</sup> A comprehensive yet incomplete list (in Russian) is annexed to the Resolution of the Plenary Supreme Court enacted 14 June 2012, N 11. See the text (in Russian) on the official website of the Supreme Court: Постановление Пленума Верховного Суда Российской Федерации «О практике рассмотрения судами вопросов, связанных с выдачей лиц для уголовного преследования или исполнения приговора, а также передачей лиц для отбывания наказания» от 14.06.2012 N 11 (ред. от 03.03.2015) <[http://vsrf.ru/Show\\_pdf.php?Id=8011](http://vsrf.ru/Show_pdf.php?Id=8011)> accessed 8 October 2017.

<sup>105</sup> Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Глава 29.1.

<sup>106</sup> Уголовно-процессуальный кодекс Российской Федерации от 18.12.2001 N 174-ФЗ (ред. от 29.07.2017). Ст. 455; Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Ст. 29.1.3.

<sup>107</sup> Конституция Российской Федерации (принята всенародным голосованием 12.12.1993). Ч. 2 ст. 50.

proceedings, as the maximum duration of deprivation of liberty prescribed under the law of administrative offences is much lower than one year.

Where an offence has been committed by a foreign national (or a foreign corporation) in the Russian territory but the perpetrator has fled, both the Criminal Procedure Code and the CAO provide for a possibility to transfer the case to a competent foreign state with request to prosecute, at the discretion of the Prosecutor General's Office.<sup>108</sup>

## 6 Concluding remarks

Russian scholars express contrasting views on how the law on criminal jurisdiction should be reformed. Some scholars view overextension of jurisdiction as leading to a concurrence of jurisdictions, which, in turn, diminishes 'personal legal certainty' or 'legal security', or predictability of one's legal status. Some other scholars argue in favour of expansion of jurisdiction to the widest extent acceptable under international law.<sup>109</sup> It has been widely acknowledged that a proper fulfilment of international obligations to implement international criminal law requires establishment of such jurisdictional principles that would enable effective prosecution of international crimes.<sup>110</sup>

At the same time, Russia is a party to several human rights treaties that may potentially limit the territorial reach of Russian criminal law, such as the European Convention on Human Rights<sup>111</sup> and the International Covenant on Civil and Political Rights.<sup>112</sup> These instruments are directly applicable before Russian courts, along with interpretations thereof pronounced by international judicial and quasi-judicial bodies. Constitutional guarantees of legality may also serve as a safeguard against unjustified extension of jurisdiction.

The most outdated statutory provisions in need of legislative reform are the provisions on the territorial principle. There is a probability that a future high-profile case concerning trans-border criminality will prompt the Russian legislature to amend the law. Another welcome change would be an introduction of the active personality principle to the COA, at least with respect to some specific offences.

The Russian legal system has thus far resisted attempts to introduce corporate criminal responsibility, whereas the jurisdictional framework provided by law of administrative offences does not allow to fully address illicit corporate conduct abroad. The law of

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<sup>108</sup> Уголовно-процессуальный кодекс Российской Федерации от 18.12.2001 N 174-ФЗ (ред. от 29.07.2017). Ст. 458; Кодекс Российской Федерации об административных правонарушениях от 30.12.2001 N 195-ФЗ (ред. от 29.07.2017). Ст. 29.1.6.

<sup>109</sup> Есаков Г.А., Экстерриториальное действие уголовного закона: современные мировые тенденции // Закон. 2015, № 8. С. 85.

<sup>110</sup> Богуш Г.И., Есаков Г.А., В.Н. Русинова, Международные преступления: модель имплементации в российское уголовное законодательство. М., 2017. С. 32.

<sup>111</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 7.

<sup>112</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 15.

administrative offences does not penalize many international crimes, which further diminishes corporate accountability for violations of human rights under Russian law.

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# SWISS REPORT ON PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW

By Mark Pieth\*

## 1 Introduction

The key sentence in the famous *Lotus* case was: ‘a state’s title to exercise jurisdiction rests in its sovereignty’.<sup>1</sup> Indeed, sovereignty is the fundamental concept of the nation state. The emergence of states from the 16<sup>th</sup> century on led to the replacement of the old personality principle (distinguishing noblemen, clergy, free farmers and dependents) by territoriality.<sup>2</sup> It was understood as a power of state embedded in its discretion, in the time of absolutism only hemmed in by the power of others.<sup>3</sup> Gradually, limits were developed by international law (especially restraining the right to enforce beyond borders to situations subject to the agreement of the foreign state). Jurisdiction extends to all powers of state (therefore in international law one distinguishes between competences to legislate, adjudicate and to enforce).<sup>4</sup> For the purposes of this study and in line with the Swiss debate in criminal law we are focusing on judicial jurisdiction. Enforcement beyond borders is a matter for mutual administrative and legal assistance as well as extradition.

With increasing competition amongst states the notion of territoriality was extended first to cover fundamental public interests (the so called protective principle)<sup>5</sup> and to boats and aircraft abroad (‘flag principle’, *le principe du pavillon*).<sup>6</sup> Active personality or nationality emerged with the ambition to control one’s citizens even abroad (and at first independently from dual criminality). Equally, an expression of imperialism at the end of the 19<sup>th</sup> century, passive personality or nationality was adopted in most countries in Europe; it was, however, never universally accepted.<sup>7</sup>

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<sup>1</sup> *Case of SS Lotus (France v Turkey)* [1927] PCIJ Ser A, No 10, 19.

<sup>2</sup> Mark Pieth, *Strafrechtsgeschichte* (Basel 2015) 13, 24 et seq.

<sup>3</sup> Pieth (n 2) 38 et seq.

<sup>4</sup> Christopher Blakesley, ‘“Extraterritorial Jurisdiction”’ in M Cherif Bassiouni (ed), *International Criminal Law* (2<sup>nd</sup> edn, New York 1999) 33, 36; Tim Hillier, *Sourcebook on Public International Law* (London 1998); International Bar Association (IBA) *Report of the Task Force on Extraterritorial Jurisdiction* (London 2008) 7 et seq.

<sup>5</sup> Blakesley (n 4) 33, 54; Conseil de l’Europe, ‘Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime’ (ETS No 141, 8 November 1990) 13; Geoff Gilbert, ‘Crimes sans frontières: Jurisdictional Problems in English Law’ in John Dugart and Christine van den Wyngaert (eds.), *International Criminal Law and Procedure* (Aldershot et al 1996) 101, 106.

<sup>6</sup> Conseil de l’Europe, ‘Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime’ (ETS No 141, 8 November 1990) 12 et seq.; Gilbert (n 5) 101, 118.

<sup>7</sup> International Bar Association (n 4) 147; Mark Pieth, ‘Art. 4 Jurisdiction’ in Mark Pieth, Lucinda A Low and Nicola Bonucci (eds), *The OECD Convention on Bribery* (2<sup>nd</sup> edn, Cambridge 2014) 322, 325 et seq.

After the Second World War, jurisdictional concepts were subjected to fundamental change: The first wave of commercial globalization made the need for co-operation become obvious. In the late 1950s the Council of Europe developed a system of mutual legal assistance and extradition treaties,<sup>8</sup> later on further expanded with Protocols and picked up by the EU and its corresponding instruments.<sup>9</sup> Concurrently, extraterritorial jurisdiction was reorganized to meet the requirements of international solidarity.<sup>10</sup> The personality concepts were made dependent on dual criminality, the notions of ‘vicarious jurisdiction and universality’ emerged to tackle forms of serious crime even where the country assuming jurisdiction did not have a direct interest of its own in the case (e.g. crimes against humanity).<sup>11</sup>

Whereas the economy in the Western World picked up dramatically from the 1970s, the development went along with substantial industrial hazards.<sup>12</sup> The Anglo-Saxon world had already in the early years of the 20<sup>th</sup> century adopted forms of criminal corporate liability.<sup>13</sup> In Europe environmental crime spurred legislators to follow suit.<sup>14</sup> Later on, after the fall of the Berlin Wall, globalization further accelerated. Incidentally, the development was paralleled by with a new horizon in technological development (the cyber revolution). The opening of new markets offered new chances for transnational corporations, but it allowed also crime to internationalize: Various forms of macro-crime, especially economic and organized crime, were boosted. In parallel, regional conflicts, some ideological in nature (the fall out of the Arab Spring),<sup>15</sup> others more focused on the control over essential commodities (e.g. in East Congo), led to serious human rights violations.<sup>16</sup>

The world community reacted with international regulation to combat organized crime, drug trafficking, money laundering, corruption, terrorism and also serious forms of human rights violations. A multitude of conventions was drafted,<sup>17</sup> paralleled by soft law

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<sup>8</sup> Mark Pieth, *Wirtschaftsstrafrecht* (Basel 2016) 33.

<sup>9</sup> Pieth (n 8) 33.

<sup>10</sup> Ursula Cassani, ‘Die Anwendbarkeit des Schweizerischen Strafrechts auf internationale Wirtschaftsdelikte’ [1996] 114 *Schweizerische Zeitschrift für Strafrecht* 237; Sabine Gless, *Internationales Strafrecht, Grundriss für Studium und Praxis* (2<sup>nd</sup> edn, Basel 2015) 66; Mark Pieth, ‘Internationale Harmonisierung von Strafrecht als Antwort auf transnationale Wirtschaftskriminalität’ [1997] 109 *Zeitschrift für die gesamte Strafrechtswissenschaft* 756, 771.

<sup>11</sup> Mark Pieth, *Strafrecht, Besonderer Teil* (Basel 2018) 279.

<sup>12</sup> Think of atomic catastrophes (like Tschernobyl, Three Mile Island or chemical disasters like Bhopal); cf. Pieth (n 2) 100.

<sup>13</sup> John C Coffee, ‘Corporate Criminal Liability: An Introduction and Comparative Survey’ in Albin Eser, Günter Heine and Barbara Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (Freiburg 1999) 9; Ved P Nanda, ‘Corporate Criminal Liability in the United States: Is a New Approach Warranted?’ in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability* (Dordrecht et al 2011) 63 et seq.; Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability* (Dordrecht et al 2011) 7 et seq.; Celia Wells, ‘Corporate Criminal Liability in England and Wales: Past, Present and Future’ in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability* (Dordrecht et al 2011) 91.

<sup>14</sup> Pieth and Ivory (n 13) 9 et seq.

<sup>15</sup> Arnold Hottinger, ‘Two Years Later: The Arab Revolutions in Transition’ in Gretta Fenner-Zinkernagel, Charles Monteith and Pedro Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (Bern 2013) 3 et seq.

<sup>16</sup> Cf. the references in Pieth (n 2) 110.

<sup>17</sup> Cf. Pieth (n 2) 119 et seq.

instruments (e.g. Recommendations by Task Forces).<sup>18</sup> International organizations began to monitor the implementation of the international standards with peer reviews<sup>19</sup>. In the meantime most international criminalization instruments demand that corporations are held (criminally or otherwise) responsible:<sup>20</sup> They typically also address the issue of jurisdiction.

However, many of the international standards remain soft law (like the *Ruggie Principles*)<sup>21</sup> and what is more, the translation into national law is frequently insufficient. Finally, the new supranational instruments to combat the most serious human rights violations (especially genocide) omit to address the role of corporations (cf. art 25 Rome Statute). Even where rules have been defined and implemented on a domestic level they typically lead to a patchwork of sometimes overlapping, sometimes deficient jurisdictions: The conflict of jurisdictions is rarely discussed.

The recent developments are particularly relevant to a country like Switzerland, since it is a preferred hub for multinational corporations:<sup>22</sup> Switzerland as a leading financial and service center may be attractive, but it is exposed to a multitude of hazards and the companies based in Switzerland are at risk of harming human rights in particular in the developing world. Therefore, the research question of this survey is especially meaningful relevant to Switzerland.

## 2 General Framework

In this chapter the three components of our topic – the legal rules governing the prosecution of corporations (2.1), the principles of jurisdiction (2.2) and the relevant international crimes (2.3) – will be visited independently.

### 2.1 The Legal Rules governing the Prosecution of Corporations

#### 2.1.1 *The Development of Corporate Criminal Liability in Switzerland*

As in neighbouring countries, Swiss teachers of criminal law upheld the traditional concept that corporations cannot commit crimes (*societas delinquere non potest*).<sup>23</sup> However, various

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<sup>18</sup> New forms of co-regulation emerged: Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a „Post-Regulatory“ World' in Michael Freeman (ed), *Current Legal Problems* (Oxford 2001) 103 et seq.

<sup>19</sup> Nicola Bonucci, 'Art. 12, Monitoring and Follow-up' in Mark Pieth, Lucinda A Low and Nicola Bonucci (eds), *The OECD Convention on Bribery* (2<sup>nd</sup> edn, Cambridge 2014) 534 et seq.

<sup>20</sup> Pieth (n 8) 51 et seq.

<sup>21</sup> Human Rights Council, Guiding Principles on Business and Human Rights, Implementing the United Nations „Protect, Respect and Remedy“ Framework, 21 March 2011 (A/HRC/17/31).

<sup>22</sup> Positionspapier und Aktionsplan des Bundesrates zur Verantwortung der Unternehmen für Gesellschaft und Umwelt (Position paper and action plan of the federal council on corporate responsibility for society and environment), 1 April 2015.

<sup>23</sup> Martin Böse, 'Corporate Criminal Liability in Germany' in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability* (Dordrecht et al 2011) 227, 228; José Hurtado Pozo, 'Quelques réflexions sur la responsabilité pénale de l'entreprise' in Jürg-Beat Ackermann, Andreas Donatsch and Jörg Rehberg (eds), *Wirtschaft und Strafrecht, Festschrift Schmid* (Zürich 2001) 187, 189; Sandra Lütolf, *Strafbarkeit der juristischen Person* (Zürich

developments softened this principle: First, a series of leading cases holding individual managers responsible for acts committed by their employees helped transfer civil law concepts (*respondeat superior*) into criminal law. In particular in two cases related to illegal arms exports courts have held managers responsible for failing to prevent crimes<sup>24</sup> or for failing to establish adequate compliance programs.<sup>25</sup> From a different perspective, practice in the area of crimes against humanity developed so called ‘command responsibility’,<sup>26</sup> now translated into Swiss domestic law (Art. 264k Criminal Code [CC]).<sup>27</sup> The drafting of legislation on actual corporate liability was, however, triggered by a dangerous fire in a chemical factory close to the city of Basel in 1986.<sup>28</sup> A first draft followed models developed in other European countries (especially France, Belgium, the Netherlands and Denmark) which had in turn influenced the Recommendation of the Council of Europe R (88) 18. The initial draft of 1991 foresaw a general corporate responsibility for all kinds of enterprises for all major offences. The maximum sanction was a fine of CHF 10 million, apart from confiscation and additional sanctions like a compliance monitorship or even the dissolution of the company were necessary:<sup>29</sup> Local government and especially business interest opposed violently<sup>30</sup> and managed to transform the government proposal into a form of

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1997) 95 et seq.; Bertrand Perrin, ‘La responsabilité pénale de l’entreprise en droit suisse’ in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability* (Dordrecht et al 2011) 193, 198; Niklaus Schmid, ‘Einige Aspekte der Strafbarkeit des Unternehmens nach dem neuen Allgemeinen Teil des Schweizerischen Strafgesetzbuchs’ in Hans Caspar von der Crone et. al. (eds), *Neuere Tendenzen im Gesellschaftsrecht, Festschrift Forstmoser* (Zürich 2003) 761; Thomas Weigend, ‘Societas delinquere non potest? A German Perspective’ [2008] *Journal of International Criminal Justice* (JICJ) 927 et seq.

<sup>24</sup> The famous case “*Bührle*”: FCD [Swiss Federal Court Decision] 96 IV 156.

<sup>25</sup> The case “*Von Roll*” (Super canon for Saddam Hussein): FCD 122 IV 103.

<sup>26</sup> Originally developed as customary international law and then integrated into the Rome Statute: Nuremberg Trial against *IG-Farben*: Judgement of 3 July 1948 (23 accused persons); Gerhard Fiolka in Marcel Alexander Niggli and Hans Wiprächtiger (eds), *Basler Kommentar Strafrecht II* (3<sup>rd</sup> edn, Basel 2013) art 264k para 38.

<sup>27</sup> Fiolka (n 26) art 264k; Pieth (n 11) 278 et seq.; Günter Stratenwerth and Felix Bommer, *Schweizerisches Strafrecht, Besonderer Teil II: Straftaten gegen die Gemeininteressen* (7<sup>th</sup> edn, Bern 2013) 268 et seq.; Hans Vest in Stefan Trechsel and Mark Pieth (eds), *Schweizerisches Strafgesetzbuch: Praxiskommentar* (3<sup>rd</sup> edn, Zürich/St. Gallen 2018) art 264k.

<sup>28</sup> Detlef Krauss, ‘Probleme der Täterschaft in Unternehmen’ in Günter Heine, Mark Pieth and Kurt Seelmann (eds), *Wer bekommt Schuld? Wer gibt Schuld? Gesammelte Schriften von Detlef Krauss* (Berlin et al. 2011) 110, 119 et seq.; Pieth (n 2) 100 et seq.

<sup>29</sup> Hurtado Pozo wrongly questions the criminal law nature of the draft.

<sup>30</sup> Cf. EJPD, Zusammenfassung der Ergebnisse des Vernehmlassungsverfahrens des Eidgenössischen Justiz- und Polizeidepartementes zum Vorentwurf über die Revision des Strafgesetzbuches und des Militärstrafgesetzes betreffend die Strafbarkeit der kriminellen Organisation, die Einziehung, das Melderecht des Financiers und die Verantwortlichkeit des Unternehmens vom Juni 1992 (EJPD, Summary of the Results of the Consultation Procedure of the General Secretariat of the Federal Department of Justice and Police) 4, 19 et seq.; cf. on the Federal Council’s withdrawal of the draft: Botschaft des Bundesrates Botschaft über die Änderung des Schweizerischen Strafgesetzbuches und des Militärstrafgesetzes (Revision des Einziehungsrechts, Strafbarkeit der kriminellen Organisation, Melderecht des Financiers) vom 30. Juni 1993, BBl 1993 III 277; Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuches (Allgemeine Bestimmungen, Einführung und Anwendung des Gesetzes) und des Militärstrafgesetzes sowie zu einem Bundesgesetz über das Jugendstrafrecht vom 21. September 1998, BBl 1999 II 1979 (2139 et seq.); Gerhard Schmid, ‘Gedanken eines Nicht-Strafrechtlers zu den gesetzgeberischen Bemühungen um ein Unternehmensstrafrecht’ [2001] 119 *Schweizerische Zeitschrift für Strafrecht* 18.

secondary (subsidiary) responsibility in case – due to the disorganization of the company – no individual could be held responsible for the crime.<sup>31</sup> Literally in the last minute of the parliamentary debate a series of international treaties was enacted. All demanding meaningful ('effective, proportionate and dissuasive') corporate liability<sup>32</sup>. Parliament shifted to a form of 'autonomous' or 'objective' approach.<sup>33</sup> Again, though, pressure from academia<sup>34</sup> and business prevented a simple solution.

The current model (art 102 CC) suffers of the inconsistencies of a bad compromise:<sup>35</sup> In section 1 the secondary or subsidiary form of responsibility put forward by the government in 1998 under pressure by business interests survived. Only if, due to the lack of organization of the enterprise, an individual cannot be held responsible is the corporation responsible for crimes within and in the interest of the corporation. In section 2 of art 102 CC an in-principle liability of companies for lack of sufficient organization preventing some specific key economic crimes (especially in the area of organized crime, money laundering, corruption and financing of terrorism) is foreseen.

### 2.1.2 Requirements

#### *Definition of Corporation*

Even though Swiss corporate criminal liability uses an economic rather than a legal term ('enterprise'),<sup>36</sup> art 102 section 4 CC breaks it down into legal categories, covering well beyond legal persons, all sorts of business entities, excluding merely pure state entities on the grounds that a state cannot sanction itself.<sup>37</sup>

#### *Predicate Offences*

As mentioned, section 2 relates to selected economic crime reflecting international obligations Switzerland has signed up to: combating organized crime, financing of terrorism, money laundering, active public domestic and foreign corruption, the giving of

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<sup>31</sup> Botschaft des Bundesrates (n 30) BBl 1999 II 1979 (2143 et seq.).

<sup>32</sup> In particular Art. 2 of the OECD Anti-Corruption Convention: cf. Mark Pieth, 'Art. 2 The Responsibility of Legal Persons' in Mark Pieth, Lucinda A Low and Nicola Bonucci (eds), *The OECD Convention on Bribery* (2<sup>nd</sup> edn, Cambridge 2014) 212 et seq.

<sup>33</sup> Using modes put forward by Günter Heine, *Die strafrechtliche Verantwortlichkeit von Unternehmen* (Baden-Baden 1995) 248 et seq. and Mark Pieth, 'Internationale Anstösse zur Einführung einer strafrechtlichen Unternehmenshaftung in der Schweiz' [2001] 119 *Schweizerische Zeitschrift für Strafrecht* 1, 12; cf. also Mark Pieth, 'Anwendungsprobleme des Verbandsstrafrechts in Theorie und Praxis' [2015] 6 *Kölner Schrift zum Wirtschaftsrecht* 223, 225.

<sup>34</sup> Gunther Arzt, 'Unternehmensstrafbarkeit – Fernwirkungen im materiellen Strafrecht (Fahrlässigkeit, Begünstigung, Urkundendelikte, Geschäftsbesorgung)' [2004] *recht* 213, 216; cf. the narrative by Marc Jean-Richard-dit-Bressel, *Das Desorganisationsdelikt, Art. 102 Abs. 2 StGB im internationalen Kontext* (Zürich 2013) 4.

<sup>35</sup> Günter Heine, 'Das kommende Unternehmensstrafrecht (Art. 100quater et seq.)' [2003] 121 *Schweizerische Zeitschrift für Strafrecht* 24, 29 et seq; Mark Pieth, 'Die Strafrechtliche Verantwortung des Unternehmens' [2003] 121 *Schweizerische Zeitschrift für Strafrecht* 353, 356 et seq.; cf. also Pieth (n 33) 223, 229; Mark Pieth, 'Plädoyer für die Reform der strafrechtlichen Unternehmenshaftung' [2018] *Jusletter* 19 February.

<sup>36</sup> Schmid (n 23) 761, 769.

<sup>37</sup> Marcel Alexander Niggli and Stefan Maeder, 'Unternehmensstrafrecht' in Jürg-Beat Ackermann and Günter Heine (eds), *Wirtschaftsstrafrecht der Schweiz* (Bern 2013) 163, 174 et seq.; Pieth (n 8) 61 et seq.

gratuities as well as private active corruption. All other crimes follow the (far less stringent) regime of section 1 (including homicide and crimes against humanity as well as other serious offences against human rights).<sup>38</sup>

### *The Link Between the Offence and the Corporate Goal*

Swiss corporate liability is limited by a triple formula<sup>39</sup> to the aims of the corporation. First, the offence needs to be committed 'within an enterprise', furthermore 'in the course of its business activities' and finally within the framework of the 'corporate goal': The formula wants to exclude corporate liability for private activities of its employees. Whether 'within an enterprise' has – in the opinion of some authors – the effect of excluding responsibility in a holding structure, however, needs to be further debated.

## 2.2 Deficiencies in Organization

Art 102 CC makes responsibility dependent upon corporate disorganization:<sup>40</sup> section 1 for impeding authorities to find the responsible individual; according to section 2 the deficient company fails to prevent one of the enumerated offences. The standard relates to the detailed compliance principles established to the relevant offences, especially on anti-money laundering, countering the financing of terrorism and anti-corruption.<sup>41</sup>

### 2.2.1 Sanctions

The sanctions for Swiss corporate criminality have been drastically simplified and lowered against the first draft: the maximum fine is now CHF 5 million. Apart from confiscation (arts 70 and 71 CC) no other sanctions have been introduced. However, in practice authorities have developed a certain leeway in negotiating settlements:

The Swiss subsidiary of Alstom SA (Alstom Network Schweiz AG) was accused of having participated in bribery in various countries (amongst them Latvia, Tunisia and Malaysia). Instead of a traditional conviction the case ended with a settled fine of CHF 2.5 million and compensation to victims of CHF 36.4 million against the Swiss subsidiary, whereas the case against the French parent company

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<sup>38</sup> Heine (n 35) 38 et seq.; Jean-Richard-dit-Bressel (n 34) 27 et seq.; Marcel Alexander Niggli and Diego R Gfeller in Marcel Alexander Niggli and Hans Wiprächtiger (eds), *Basler Kommentar Strafrecht I* (3<sup>rd</sup> edn, Basel 2013) Art. 102 para 230 et seq.; Pieth (n 35) 353, 360; Mark Pieth, 'Der Einfluss des internationalen Rechts auf das Schweizer Strafrecht' [2012] 131 Zeitschrift für Schweizerisches Recht 233, 279 et seq.; Niklaus Schmid, 'Strafbarkeit des Unternehmens: die prozessuale Seite' [2003] recht 201, 205 et seq.

<sup>39</sup> Jean-Richard-dit-Bressel (n 34) 237 et seq.

<sup>40</sup> Pieth (n 35) 353, 363 et seq.; Mark Pieth, 'Risikomanagement im Strafrecht: Organisationsversagen als Voraussetzung der Unternehmenshaftung' in Thomas Sutter-Somm et al. (eds), *Risiko und Recht, Festgabe zum Schweizerischen Juristentag 2004* (Basel 2004) 597, 603 et seq.; Pieth and Ivory (n 13) 33 et seq.

<sup>41</sup> Matthias Forster, *Die strafrechtliche Verantwortlichkeit des Unternehmens nach Art. 102 StGB* (St. Gallen 2006) 230 et seq.; Roman Geiger, *Organisationsmängel als Anknüpfungspunkt im Unternehmensstrafrecht: aufgezeigt am Beispiel Geldwäschereibekämpfung im Private Banking einer Bank-AG* (Zürich 2006) 140 et seq.; Jean-Richard-dit-Bressel (n 34) 279, 284, 307 et seq.; Pieth (n 8) 52 et seq.

was closed against a symbolic restitution of CHF 1 million to the International Committee of the Red Cross.<sup>42</sup>

### 2.2.2 Procedure

Even though general rules of criminal procedure are applicable to corporate liability, some issues have been discussed. There has been a debate whether the fundamental guarantees derived from human rights, like the privilege against self-incrimination and the right to be heard apply in the same way as to individuals. Even though some doubts have been voiced,<sup>43</sup> it is established that corporations have the same right to a fair trial as individuals.<sup>44</sup>

The Swiss Code of Criminal Procedure (CCP) has developed an explicit rule on the representation of corporations in criminal proceedings (art 112 CCP) ensuring that a single person without conflicts of interest acts as representative. Another rule deals with the procedural role of senior management and the supervisory report; its members are put in a position somewhere between accused and witnesses, invited to 'assist the authorities' ('*Auskunftsperson*') (without strict obligation to testify; art 178 lit. g CCP). The same position extends to the closest collaborators of senior management, whereas employees in general are treated as witnesses with all duties and privileges.<sup>45</sup>

Swiss procedural law has accepted settlements and has foreseen a special simplified procedure applicable both to individual and corporate defendants.<sup>46</sup>

## 2.3 Principles of Jurisdiction

The evolution of concepts of adjudicatory jurisdiction in general have been discussed above (1). Switzerland has in general followed the evolution of other countries. In a recent revision of its General Part of the Criminal Code it has, however, chosen an (unnecessary) complicated way of presenting the principles. In particular, the new art 7 CC contains at the same time active and passive nationality, vicarious jurisdiction and a segment of universality without maintaining the clarity of the old law.<sup>47</sup> The detail of the Swiss regulation will be further discussed below (under 3).

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<sup>42</sup> Stefan Lenz and Walter Maeder, 'Grenzüberschreitende Korruption. Die Anwendbarkeit des schweizerischen Unternehmensstrafrechts aus Sicht der Praktiker' [2013] *Forum Poenale* 33, 35 et seq.; Simone Nadelhofer do Canto, 'Millionenbusse gegen Alstom-Tochter wegen ungenügender Vorkehrungen gegen Bestechung. Besprechung des Strafbefehls der Schweizerischen Bundesanwaltschaft gegen die Alstom Network Schweiz AG vom 22. November 2011' [2012] *GesKR* 129 et seq.; Niggli and Maeder (n 37) 163, 197 et seq.; Pieth (n 8) 75, 270; Pieth (n 33) 223, 228.

<sup>43</sup> Gunther Arzt, 'Schutz Juristischer Personen gegen Selbstbelastung' [2003] *Juristenzeitung* 456 et seq.

<sup>44</sup> FCD 135 II 86; Carlo Antonio Bertossa, *Unternehmensstrafrecht – Strafprozess und Sanktionen* (Bern 2003) 148; Katharina Drope, *Strafprozessuale Probleme bei der Einführung einer Verbandsstrafe* (Berlin 2002) 202; Mark Pieth, *Schweizerisches Strafprozessrecht* (3<sup>rd</sup> edn, Basel 2016) 263; Pieth (n 33) 223, 228; Pieth (n 2) 603 et seq.; Schmid (n 38) 201, 206 et seq.

<sup>45</sup> Mark Pieth, *Schweizerisches Strafprozessrecht* (3<sup>rd</sup> edn, Basel 2016) 267.

<sup>46</sup> Art. 358 et seq. CCP; crit. Niklaus Oberholzer, *Grundzüge des Strafprozessrechts* (3<sup>rd</sup> edn, Bern 2012) 525 et seq.; Pieth (n 8) 270 et seq.

<sup>47</sup> Gless (n 10) 49.

## 2.4 The Human Rights Framework

### 2.4.1 *The Evolution*

Switzerland has adopted in a first phase The Hague Convention (against war crimes) of 1907,<sup>48</sup> the four Geneva Conventions and their Additional Protocols<sup>49</sup> as well as the Genocide Convention of 1948 (even if as late as 2000).<sup>50</sup> These international instruments have been translated into national law (partly in the Criminal Code: Art. 264 et seq. CC, partly in the Military Criminal Code: previously Art. 109 MCC).

These rules have been rarely applied. It will, though, be noted that Switzerland has (unilaterally) sanctioned the Rwandan *Fulgence Niyonteze* to 14 years imprisonment for genocide in a military trial based on the former Art. 109 MCC.<sup>51</sup>

In more recent times the international community has mustered the courage to address serious human rights violations, first in ad-hoc-tribunals, addressing specific regional conflicts<sup>52</sup> and later on in a general manner with the Rome Statute.<sup>53</sup> Switzerland is participating in the supranational or 'direct' enforcement,<sup>54</sup> first by granting assistance<sup>55</sup> and– since the 1<sup>st</sup> January 2011<sup>56</sup> – with a detailed code on substantive crimes against humanity and war crimes, allowing it to run cases within the country.

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<sup>48</sup> Abkommen betreffend die Gesetze und Gebräuche des Landkriegs vom 18. Oktober 1907 (SR 0.515.112) (Convention concerning the Laws and Customs of War on Land of 18 October 1907); Kai Ambos, *Internationales Strafrecht. Strafanwendungsrecht – Völkerstrafrecht – Europäisches Strafrecht – Rechtshilfe* (3<sup>rd</sup> edn, München 2011) 105 et seq.; Andreas Donatsch, Marc Thommen and Wolfgang Wohlers, *Strafrecht IV, Delikte gegen die Allgemeinheit* (5<sup>th</sup> edn, Zürich 2017) 294 et seq.; Helmut Satzger, *Internationales und Europäisches Strafrecht: Strafanwendungsrecht, Europäisches Straf- und Strafverfahrensrecht, Völkerstrafrecht* (7<sup>th</sup> edn, Baden-Baden 2016) 380 et seq.; Gless (n 10) 223 et seq.; Pieth (n 11) 273 et seq.

<sup>49</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (SR 0.518.12); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (SR 0.518.23); Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (SR 0.518.42); Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (SR 0.518.51); Protocol (I) additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (SR 0.518.521); Protocol (II) additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts of 12 August 1949 (SR 0.518.522); Protocol (III) additional to the Geneva Conventions relating to the Adoption of an Additional Distinctive Emblem of 8 June 1977 (SR 0.518.523).

<sup>50</sup> Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (SR 0.311.11).

<sup>51</sup> Gless (n 10) 317; Marco Sassòli, 'Le Génocide rwandais, la justice militaire suisse et le droit international' [2002] *Swiss Review of International and European Law* 151; Vest (n 27) art 264 para 4; Hans Vest, 'Zum Verhältnis zwischen Bürgerkrieg und Völkermord in Ruanda' [2000] 96 *Schweizerische Juristenzeitung* 258 et seq.

<sup>52</sup> On ad-hoc-tribunals: Gless (n 10) 232 et seq.

<sup>53</sup> On the Rome Statute: Gless (n 10) 237 et seq.

<sup>54</sup> Gless (n 10) 231.

<sup>55</sup> Bundesgesetz über die Zusammenarbeit mit den Internationalen Gerichten zur Verfolgung schwerwiegender Verletzungen des humanitären Völkerrechts vom 21. Dezember 1995 (SR 351.20); Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof (ZISG) vom 22. Juni 2001 (SR 351.6); Gless (n 10) 317.

<sup>56</sup> Art 264 et seq. CC.

Art 264m CC contains a special rule on universality jurisdiction – in case the defendant is in Switzerland and cannot be extradited to another state or an international court (*aut dedere aut iudicare*). A ‘genuine’ link to Switzerland is no longer required,<sup>57</sup> however, Swiss authorities may close the case if another authority is already prosecuting the case.<sup>58</sup> The concept of prosecutorial discretion (Art. 8 CPC) would also allow to refrain from prosecution if the victim state has established a ‘Truth and Reconciliation procedure’.

#### 2.4.2 Corporate Criminal Liability and the Protection of Human Rights?

One of the main deficits of the international treaty system on the protection of human rights is that corporate liability is frequently omitted, both on a supranational level and when defining concepts for ‘indirect enforcement’.

Of course, individual nation states may subject corporations to responsibility for serious violations of human rights. The difficulty for the Swiss prosecutor will already become apparent since not even ‘core crimes’ are on the list of Art. 102 section 2 CC; merely the subsidiary (weak) form of section 1 applies.

The problems may be exemplified with a serious case recently adjudicated in Switzerland:

The Federal Attorney’s Office was confronted with allegations (by NGOs and UN Representatives) against a Gold Smelter based in Switzerland that several tons of conflict gold (acquired from a guerrilla organization in East Congo notoriously involved in genocide): The authorities investigated the company representatives for participating in plundering as a method of warfare.<sup>59</sup> The case was, however, closed for lack of *mens rea*.<sup>60</sup>

The example has also demonstrated that according to current Swiss law serious human rights violations by corporations may merely be brought to court – based on art 102 section 2 CC – if the human rights violation is a predicate offence to money laundering.<sup>61</sup> These difficulties have given rise to an intense political debate in Switzerland. Currently signatures are being collected to trigger a referendum for an amendment of the Constitution, attempting to transform the essence of the ‘Ruggie Principles’ into binding law (*‘Konzernverantwortungsinitiative’*).<sup>62</sup> It will be noted, though, that the initiative does not in itself aim at changing criminal corporate liability.

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<sup>57</sup> The Requirement of a ‘genuine link’ has been given up in international cases in general: FCD 141 IV 205 (210), 133 IV 171 (177); FCCD 6B\_127/2013 (4.2.1).

<sup>58</sup> For details Fiolka (n 26) Art. 264m para 17 et seq.

<sup>59</sup> Art. 264g section 1 lit. c CC; cf. Art. 8 section 2 lit. b Rome Statute.

<sup>60</sup> Pieth (n 8) 16, 234; cf. Einstellungsverfügung der Bundesanwaltschaft vom 10.3.2015 in Sachen A. und B. betreffend Verdacht der Geldwäscherei und Gehilfenschaft zu Kriegsverbrechen durch Plünderung (Ruling Abandoning Proceedings of the Office of the Attorney General of Switzerland); see also UN Security Council 16.10.2002 (S/2002/1146); UN Security Council 23.10.2003 (S/2003/1027); UN Security Council 26.7.2005 (S/2005/436); UN Security Council 27.1.2006 (S/2006/53); James G Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources Open Society Justice Initiative Publication* (New York 2011).

<sup>61</sup> Art 305bis in connection with Art. 102 section 2 CC.

<sup>62</sup> Cf. below 3.2.4, 3.2.5.

### 3 Corporate Criminal Liability and Jurisdiction

As indicated above (1) territoriality remains the principle jurisdictional basis, even though recently justice beyond borders has become a more relevant topic. The traditional forms of extraterritorially (nationality and protective principle) have been supplemented by concepts extending to cases where the competent state has no genuine interest of its own (vicarious and universality jurisdiction).<sup>63</sup>

The following chapter will explore the applicability of the main jurisdictional principles to corporate liability.

#### 3.1 Territorial Jurisdiction

Territoriality had for Switzerland historically a somewhat different meaning than in the neighboring countries since Switzerland largely missed out on absolutism. All the more, the right to elect one's own judges and to be tried by them played a fundamental role in the development of Swiss statehood (*'die eigenen Richter'*<sup>64</sup>).

##### 3.1.1 Legal Framework

Two rules are decisive: Art 3 CC contains the territoriality principle itself and art 8 CC specifies that both criminal behavior (acts or omission<sup>65</sup>) and the effect (*'Erfolg'*) determine the place where the offence has been committed (the so called 'ubiquity-theory').<sup>66</sup>

There is little debate about the meaning of territoriality, the borders define its horizontal limits, vertically it extends below and above the surface.<sup>67</sup>

The definition of 'effect' has, however, caused some substantial problems since Swiss (as German) doctrine distinguishes offences that are defined merely by an activity (including those penalizing the creation of a merely theoretical risk) and the group of technical 'effect-offences'. Only for the second category practice accepts the 'effects'-doctrine.<sup>68</sup> This distinction may seem theoretic, however, it has very practical consequences for jurisdiction in particular in the area of cyber-crime, where it is rather coincidental how the offence has been written.<sup>69</sup>

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<sup>63</sup> On the issue of a 'genuine link': Gless (n 10) 48.

<sup>64</sup> Cf. the privilege given to Cantons in central Switzerland as early as 1389 for Uri, 1415 for Schwyz and Obwalden and 1417 for Nidwalden: Louis Carlen, *Rechtsgeschichte der Schweiz* (3<sup>rd</sup> edn, Bern 1998) 24; Pieth (n 2) 17.

<sup>65</sup> Peter Popp and Tornike Keshelava in Marcel Alexander Niggli and Hans Wiprächtiger (eds), *Basler Kommentar Strafrecht II* (3<sup>rd</sup> edn, Basel 2013) art 3 para 11.

<sup>66</sup> Popp and Keshelava (n 65) art 8 para 4 et seq.; Ursula Cassani, 'Grenzüberschreitende Korruption – Internationale Zuständigkeit der Schweizerischen Strafjustiz' in Jürg-Beat Ackermann and Wolfgang Wohlers (eds), *Korruption in Staat und Wirtschaft, 4. Zürcher Tagung zum Wirtschaftsstrafrecht* (Zürich 2010) 17, 22; Gless (n 10) 53 et seq.

<sup>67</sup> Popp and Keshelava (n 65) art 3 para 3 et seq.

<sup>68</sup> Popp and Keshelava (n 65) art 3 para 9 et seq.; Cassani (n 66) 17, 22 et seq.; Gless (n 10) 55; Pieth (n 8) 35.

<sup>69</sup> Christian Schwarzenegger ('Der Räumliche Geltungsbereich des Strafrechts im Internet' [2000] 118 *Schweizerische Zeitschrift für Strafrecht* 109, 124) opts for expansion of the notion of 'effect'; critical, however, Gless (n 10, fn 56), who prefers an adaptation of the text of the law.

According to art 8 section 2 CC an attempt has been committed where the perpetrator initiates the activity as well as where the effect should – in his mind – have materialized.<sup>70</sup> Some additional problems have arisen in practice regarding aiding and abetting: Whereas there is little question that the main perpetrator triggers jurisdiction where he commits the offence, according to Swiss practice a mere accessory does not trigger separate territorial jurisdiction.<sup>71</sup>

In practice case law has accepted territorial jurisdiction even on a rather slim basis: for fraud, even if the entire activity took place abroad and merely the intended enrichment was to take place in Switzerland;<sup>72</sup> likewise a mere bribery-promise emanating from Swiss territory would have been sufficient.<sup>73</sup> Finally, a payment into a Swiss bank account, e.g. in a bribery case, was considered sufficient, even though the crime was already completed with the mere promise abroad.<sup>74</sup>

### 3.1.2 Territoriality and Criminal Corporate Liability

At the center of our interest are situations triggering territorial jurisdiction for corporate crime. At least three variations need to be distinguished: (i) Switzerland is the place of the illegal offence (be in an act, an omission or the location of the effect), (ii) Switzerland is the location of the deficiently organized corporation; (iii) Switzerland is the location of the parent company (raises the question if it may be held responsible here for acts committed by its representatives or even its subsidiaries and possibly joint venture partners abroad).

### 3.1.3 Switzerland as the *locus actus*

It is obvious that if a (Swiss or foreign) representative of a company domiciled in Switzerland commits an offence according to the rules sketched above (i), jurisdiction according to Articles 3 and 8 CC is given. If *Eicker* as well as *Popp* and *Keshelava* link the offence to the location of company premises in Switzerland,<sup>75</sup> they, however, miss part of the significance of territoriality: Even if a foreign company domiciled without a business location in Switzerland offends through its representative in Switzerland (e.g. its

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<sup>70</sup> Popp and Keshelava (n 65) Art. 3 para 14.

<sup>71</sup> FCD 104 IV 77; 6B\_86/2009; Cassani (n 66) 24 et seq.; Gless (n 10) 56; Pieth (n 8) 35; Stefan Trechsel and Hans Vest in Stefan Trechsel and Mark Pieth (eds), *Schweizerisches Strafgesetzbuch: Praxiskommentar* (3<sup>rd</sup> edn, Zürich/St. Gallen 2018) Art. 8 para 8.

<sup>72</sup> FCD 109 IV 1; 117 Ib 210; 124 IV 241; 128 IV 143; BStGer [Swiss Federal Criminal Court] SK.2006.20 vom 3. Oktober 2007; SJ 1976, 375; Cassani (n 10) 255 et seq.; Cassani (n 66) 23; Gless (n 10) 53; Andreas Eicker, 'Der räumliche und zeitliche Geltungsbereich des nationalen Wirtschaftsstrafrechts' in Jürg-Beat Ackermann and Günter Heine (eds), *Wirtschaftsstrafrecht der Schweiz* (Bern 2013) 57, 68 et seq.

<sup>73</sup> Cassani (n 66) 17, 28 et seq.; Pieth (n 8) 39.

<sup>74</sup> Cassani (n 66) 17, 26 et seq., 29 with reference to Daniel Jositsch, *Das Schweizerische Korruptionsstrafrecht*, Art. 322<sup>ter</sup>–322<sup>octies</sup> StGB (Zürich 2004) 159, 451 and Mark Pieth, 'Die Strafbarkeit der aktiven Bestechung ausländischer Beamter' in Mark Pieth and Peter Eigen (eds), *Korruption im internationalen Geschäftsverkehr, Bestandesaufnahme, Bekämpfung, Prävention* (Neuwied et al 1999) 350; Rauno Hoffmann and Jürg Wyser, 'Going East. Korruptionsbedingte Risiken für Unternehmen und Mitarbeiter' [2010] GesKR 24, 36.

<sup>75</sup> Popp and Keshelava (n 65) Art. 3 para 5; Eicker (n 72) 57, 61.

representative launders money at a domestic bank) art 3 CC applies. Obviously though, enforcement of the Swiss decision abroad against the company itself may pose problems.

#### 3.1.4 *Switzerland as the place of the deficient organization*

It has become generally accepted that apart from the *locus actus* also the location of the disorganization (ii) would establish a separate territoriality jurisdiction in corporate crime.<sup>76</sup> Typically this would be at the legal domicile of the company or the subsidiary in Switzerland. Furthermore, where the factual administration takes place at a different location from the legal domicile (take the example of an off-shore company in BVI, administered from Zurich) the location of the factual administration in Switzerland would constitute an additional reference point for corporate jurisdiction.<sup>77</sup> Organizational deficits of foreign companies in their Swiss representations could equally trigger Swiss territorial competence.<sup>78</sup>

#### 3.1.5 *Swiss territorial responsibility for foreign representations?*

Based on this broad, dual attachment Swiss territorial jurisdiction may even extend to offenses committed by foreigners abroad on behalf of a Swiss corporation (iii): Based on the commission of the act itself direct responsibility would be assumed where the representative has acted on orders from the company based in Switzerland or one of its executives.<sup>79</sup> In a wider sense, a company based in Switzerland would be held responsible for the acts of its direct representatives or agents. Furthermore, so called 'multifunctional' managers, acting abroad for the parent and the subsidiary company concurrently, would trigger responsibility of the mother.<sup>80</sup>

Finally, in practice both executives<sup>81</sup> and companies<sup>82</sup> could be held directly responsible for offences committed even by legally separate entities abroad where the Swiss holding structure was economically fully in control. Here the disorganization of the parent company

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<sup>76</sup> Niggli and Gfeller (n 38) Art. 102 para 430 et seq.; Cassani (n 66) 17, 33 et seq.; Lenz and Maeder (n 42) 33 et seq., 36; Niggli and Maeder (n 37) 163, 194; Pieth (n 8) 39 et seq.; idem 2016b, 264.

<sup>77</sup> Cassani (n 66) 17, 33; cf. also Katia Villard, *La compétence du juge pénal suisse à l'égard de l'infraction reprochée à l'entreprise* (Genève 2017) 284 et seq.

<sup>78</sup> Cassani (n 66) 34 et seq.

<sup>79</sup> Pieth (n 8) 64 et seq.

<sup>80</sup> Ingeborg Schwenzer and Alain Hosang, 'Menschenrechtsverletzungen, Schadenersatz vor Schweizer Gerichten' [2011] *Swiss Review of International and European Law* 273, 277; Urofsky Philip, 'The Ralph Lauren FCPA Case: Are There Any Limits to Parent Corporation Liability?' [2013] *Bloomberg BNA*, 5 June (accessible at: <[http://www.shearman.com/en/newsinsights/publications/2013/06/the-ralph-lauren-fcpa-case-are-there-any-limits-\\_\\_>](http://www.shearman.com/en/newsinsights/publications/2013/06/the-ralph-lauren-fcpa-case-are-there-any-limits-__>)>).

<sup>81</sup> 'Von Roll': FCD 122 IV 103; Martin Schubarth ('Konzernstrafrecht' in Jürg-Beat Ackermann and Günter Heine [eds], *Wirtschaftsstrafrecht der Schweiz* [Bern 2013] 203, 209) opts for an extension of the concept of liability of managers to holding structures themselves; cf. also Matthias Heiniger, *Der Konzern im Unternehmensstrafrecht gemäss Art. 102 StGB, Die strafrechtliche Erfassung eines wirtschaftlichen Phänomens* (Bern 2011) 436 et seq.; Lenz and Maeder (n 42) 33, 34; Pieth (n 8) 65; dissenting however: Niggli and Gfeller (n 38) Art. 102 para 370, 423.

<sup>82</sup> Mark Pieth, 'Die strafrechtliche Haftung für Menschenrechtsverletzungen im Ausland' [2017] *AJP* 1013 et seq.

was used as the basis of responsibility. Jurisdiction was again based on the Swiss territoriality principle.

### 3.1.6 *Military Personnel*

Swiss Military personnel in service abroad is subject to the Military CC as far as it reaches (art 9 section 1 CC): It's focus is on 'pure military offences', on so called 'mixed-military offences' (e.g. sexual offences while in service).<sup>83</sup>

Special legislation regulates (private) security firms rendering services abroad from Switzerland.<sup>84</sup> The law goes beyond individuals. Art 26 allows even to dissolve a company offending against the law. The reach of the law is defined in Art 2, it includes situations where Swiss officials make use of private security services for purposes abroad.

## 3.2 Extraterritoriality

### 3.2.1 *Active Personality*

Active personality (or nationality)<sup>85</sup> has been a traditional concept in Swiss criminal law (however dependent on dual criminality). It has survived the recent revision of the Criminal Code, however, it is now somewhat hidden in a list of subsidiary concepts in art 7 section 1 CC.<sup>86</sup> The basic concept – *aut dedere aut judicare* or solidarity – is also to be found in individual provisions, like the description of the crimes of money laundering, active foreign bribery or the falsification of (foreign) money.

Even if the scope of territoriality in *corporate criminal responsibility* is broad, it is possible to use as a secondary attachment the active personality principle, referring to the formal domicile of a company (or a Swiss subsidiary of a foreign company) in Switzerland.<sup>87</sup> Art. 36 section 2 and 3 of the CPC indirectly recognizes this by offering a forum against companies domiciled in Switzerland. However, active personality against corporations is again subject to the dual criminality principle.

### 3.2.2 *Passive Personality*

Swiss Law has not shared the doubts of some Anglo-Saxon constituencies about passive personality (nationality),<sup>88</sup> it has, however, again made the concept dependent on dual criminality. Relating to corporate criminality there has been some uncertainty in Swiss doctrine prior to introducing corporate criminal liability: Whereas the Supreme Court

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<sup>83</sup> Gless (n 10) 118; Popp and Keshelava (n 65) Art. 9 para 1.

<sup>84</sup> Bundesgesetz über die im Ausland erbrachten privaten Sicherheitsdienstleistungen vom 27. September 2013, in Kraft seit 1. September 2015 (SR 935.41).

<sup>85</sup> International Bar Association (n 4) 13, 144 et seq.; Pieth (n 7) 322, 325 et seq.

<sup>86</sup> Popp and Keshelava (n 65) Art. 7 para 8; Eicker (n 72) 57, 63; Gless (n 10) 64 et seq.; Trechsel and Vest (n 71) Art. 7 para 1 et seq.; Günter Stratenwerth, *Schweizerisches Strafrecht, Allgemeiner Teil I: Die Straftat* (4<sup>th</sup> edn, Bern 2011) 114.

<sup>87</sup> Popp and Keshelava (n 65) Art. 3 para 5; Eicker (n 72) 61; Gless (n 10) 57, 65 (she raises the question); Lenz and Maeder (n 42) 33, 38; Pieth (n 8) 41.

<sup>88</sup> International Bar Association (n 4) 147.

accepted passive personality for companies,<sup>89</sup> some authors tried to reduce its application to SMEs, where individual victims were identifiable.<sup>90</sup> This opinion is, however, no longer an impediment to passive personality regarding corporations.<sup>91</sup>

### 3.2.3 *Protective Principle*

In international law the 'protective principle' has been called 'the ugly stepchild of territoriality'.<sup>92</sup> The concept is focused on the protection of essential state interests. According to art 4 CC it is restricted to articles 265–278 CC (defense of State interests). In recent times two offences have given rise to debate.<sup>93</sup> Art 271 CC (forbidden activities for a foreign state) is a rule defending Swiss sovereignty and insisting on foreign enforcement in Switzerland through the official channels of mutual legal and administrative assistance. It applies extraterritorially even if the actual 'official' act has to be undertaken on Swiss territory. In a more acute way art 273 CC (economic espionage) has posed problems: This rule is genuinely applied extraterritorially to any form of espionage by insiders and outsiders, making commercial secrets available to foreign public or private entities.

These rules are potentially directed at foreign states or *corporations*, but they also have an impact on Swiss companies wishing to co-operate with foreign law enforcement or supervisory agencies. Whereas art 271 CC can be overcome with a government permit, art 273 CC leaves it uncertain, whether the Swiss company participating in an 'internal investigation',<sup>94</sup> wishing to co-operate e.g. with the US Department of Justice or the SEC is in control of its business correspondence and other documents.<sup>95</sup>

### 3.2.4 *Vicarious Jurisdiction*

Especially in the time since the Second World War the need to prevent against 'safe havens' for criminals has become obvious. Typically, in Continental Europe nationals will not be extradited,<sup>96</sup> additionally the '*non-refoulement*'-principle is taken more seriously.<sup>97</sup> The logic of solidarity demands, however, that countries step in '*in lieu*' (*aut dedere aut judicare*). Regarding art 7 section 2 CC Switzerland will hear a case even against a foreigner who has neither committed a crime in Switzerland nor against a Swiss citizen if the accused cannot be extradited for reasons not related to the offence, the person is in Switzerland or is extradited to Switzerland for this offence and the act carries a certain weight, making it an

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<sup>89</sup> FCD 121 IV 147.

<sup>90</sup> Cassani (n 10) 237, 242.

<sup>91</sup> Trechsel and Vest (n 71) Art. 7 para 6; cf. also Pieth (n 8) 37 et seq.

<sup>92</sup> Hillier (n 4) 258.

<sup>93</sup> Eicker (n 72) 57, 61 et seq.; Gless (n 10) 46, 58 et seq.

<sup>94</sup> Flavio Romerio and Claudio Bazzani (eds), *Interne und regulatorische Untersuchungen* (Zürich 2015); Ingeborg Zerbès, 'Interne Untersuchungen' [2013] 125 *Zeitschrift für die gesamte Strafrechtswissenschaft* 551 et seq.

<sup>95</sup> FCD 114 IV 128; Markus Husmann in Marcel Alexander Niggli and Hans Wiprächtiger (eds), *Basler Kommentar Strafrecht II* (3<sup>rd</sup> edn, Basel 2013) Art. 271 para 29, 50 et seq.

<sup>96</sup> Cf. Switzerland: Art. 25 section 1 of the Swiss Constitution.

<sup>97</sup> Federal Act on International Mutual Assistance in Criminal Matters of 20 March 1981, Art. 3; Trechsel and Vest (n 71) Art. 7 para 13.

extraditable offence. Additionally, again dual criminality applies.<sup>98</sup> It is, however, hard to imagine that this concept would be relevant for *corporate criminal liability*, as it has its *raison d'être* in the inability to extradite – a situation genuine to individuals.

### 3.2.5 Universal Jurisdiction

More relevant could be universality: Generally speaking there are two forms of universality: so-called '*extreme universality*', independent of the law of the place of the offence, and '*relative universality*' taking dual criminality into consideration.<sup>99</sup>

Swiss law has – like neighboring states – introduced extreme universality for various serious crimes: on the one hand sexual offences (art 5 CC), on the other hand crimes against humanity (art 7 section 2 lit. b and art 264m CC).<sup>100</sup>

Art 6 CC opens the door for relative universality, introduced in implementation of international agreements (cf. below 3.3.),<sup>101</sup> supplementing the traditional concept.

Again, the question whether the universality principle could be applied to *corporations* is central to our purposes: Even if supranational law is shy to tackle corporate participation in human rights violations (art 25 Rome Statute), corporations may well be complicit in human rights violations: Think of a diamond trader acquiring 'conflict diamonds' or a gold smelter 'laundering' gold obtained through war crimes (above 2.3.2.), a corporation inspiring aggression of security services against villagers protesting against environmental or labor abuses.

So far this type of case has been tackled by means of territoriality in Switzerland (if at all).<sup>102</sup> It is, however, possible to apply universality as a subsidiary jurisdictional norm. Whereas in most cases relative universality would be applicable, in very serious cases, like the case of conspiracy to plunder as a war crime (see above 2.3.2.) absolute universality would become relevant (art 264m in combination with art 264g section 1 lit. c CC).

### 3.3 Variations based on International Law?

International criminal law is frequently treaty-based, whether it deals with so called 'core crime' or other 'treaty crime'. When ratifying international instruments States assume obligations to prosecute. Accordingly, they will need to adapt their system of jurisdictions. There is no clear difference of approach to 'core crime' and other 'treaty crime', rather the treaties adopt different approaches throughout:

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<sup>98</sup> Popp and Keshelava (n 65) Art. 3 para 28 et seq.; Art. 7 para 12 et seq.; Gless (n 10) 66 et seq.

<sup>99</sup> International Bar Association (n 4) 14, 150 et seq.; Popp and Keshelava (n 65) Art. 3 para 23 et seq.; Gless (n 10) 59 et seq.

<sup>100</sup> Popp and Keshelava (n 65) Art. 7 para 17 et seq.; Eicker (n 72) 57, 63 et seq.; Gless (n 10) 60 et seq., 63 et seq.; Sabine Gless "'Weltrechtspflege" als Ziel der Reform des Internationalen Strafrechts im revidierten AT, StGB?' [2007] Basler Juristische Mitteilungen 265 et seq.

<sup>101</sup> Popp and Keshelava (n 65) Art. 6; Gless (n 10) 62 et seq.; Trechsel and Vest (n 71) Art. 6.

<sup>102</sup> Cf. references in Pieth (n 8) 233 et seq.

- According to the further reaching model, genuine universality becomes a mandatory standard for certain offences like drug trafficking<sup>103</sup> or terrorism.<sup>104</sup>
- A second, less far reaching approach – to be found in the UN Convention against Torture<sup>105</sup> – enumerates (on a mandatory basis) territoriality, active personality and (with an opt-out clause) passive personality. It adds in section 2 vicarious jurisdiction. According to a variation of this approach, e.g. UNTOC<sup>106</sup> extends jurisdiction to serious offences committed outside the Party State with a view to commit serious offences within the territory of a Party (in particular organized crime).
- The standard for any criminalization convention, however, remains a mix of territoriality and active personality.<sup>107</sup>

It will be noted that a close-up analysis shows differences in understanding of generally accepted principles: e.g. even amongst the different anti-corruption conventions territoriality does not mean the same. Whereas the OECD- and the Council of Europe treaties on Corruption insist that territorial jurisdiction is triggered even if the crime is committed only 'in part' within the territory, the UN- and the OAS-Treaty omit this element.<sup>108</sup> Obviously such detail influences the domestic interpretation<sup>109</sup> of territoriality. Furthermore, the discrepancies lead to a patchwork of jurisdictional principles.<sup>110</sup>

Overall, though, the Swiss jurisdictional concepts, including Art. 6 CC (above 3.2.5.), are in conformity with international law.

#### 4 Conflict of Jurisdiction

Even faced with increasing economic crime it has taken time and energy to convince countries to apply corporate criminal liability. Now that – especially in the area of corruption – prosecution of corporations has become more frequent the problems of conflicting jurisdictions and risks of multiple convictions have become real,<sup>111</sup> though.

On a domestic level typically conflicts of competence are anticipated and regulated. In Switzerland the new CPC deals with the issue on the level of regulating *fora*. It deals separately with conflicts between the Federal level and Cantonal authorities (Art. 22 et seq.

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<sup>103</sup> United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988, Art. 4 section 2; UN 'Single Convention' of 1961, Art. 36.

<sup>104</sup> International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, Art. 7 section 4.

<sup>105</sup> UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, Art. 5.

<sup>106</sup> UN Convention against Transnational Organized Crime of 15 November 2000, Art. 15 section 2 (c).

<sup>107</sup> E.g. the Council of Europe Convention on Cyber Crime of 23 November 2001 or the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997, Art. 4; cf. Pieth (n 7) 322, 328.

<sup>108</sup> International Bar Association (n 4) 227; The OECD-Convention in its 'Official Commentaries' no 25 goes even further by demanding that 'the territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required'.

<sup>109</sup> Cassani (n 66) 17, 21.

<sup>110</sup> Gless (n 10) 231.

<sup>111</sup> International Bar Association (n 4) 21 et seq., 210 et seq.; Pieth (n 7) 322, 327.

CPC) and amongst Cantons (Art. 31 et seq. CPC). The Federal Criminal Court decides over conflicts (Art. 28 and Art. 40 section 2 CPC).<sup>112</sup>

The real issues, however, are the *international* conflicts. Conflicting international rules are already a problem especially for multinational corporations. Definitely concurrent enforcement or even multiple convictions create very serious challenges, indeed.

The International Bar Association (IBA) has examined issues of extraterritorial jurisdiction with a special focus on corporate liability. On an abstract level it has suggested a series of measures reaching from developing criteria and possibly a legal hierarchy to determine the priority state. It has supported co-operative methods, like consultations in individual cases, it ultimately mentions the harmonization of substantive law<sup>113</sup>. In its specific chapter on 'Bribery and Corruption' the suggestions become far more concrete.<sup>114</sup> The Study Group demands that international bodies (like the OECD's Working Group on Bribery)

- consult to develop criteria to determine the most appropriate jurisdiction. And it adds suggestions of its own, like the most adequate legislation (including corporate criminal liability), the location of evidence, the availability of prosecutorial resources etc.,
- it suggests furthermore confidential consultations on a case by case basis by the law enforcement agencies concerned.

Rightly the IBA also addresses the problem of double jeopardy (or *ne bis in idem*). The concept applies domestically and regionally (cf. in the Schengen area, according to the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union<sup>115</sup>); it does, however, not apply throughout internationally.<sup>116</sup> So far, it has merely become customary to take convictions abroad into account ('*Anrechnungsprinzip*'<sup>117</sup>).

## 5 Proposals for Reform

On a technical level it has become obvious that several deficiencies are waiting to be corrected:

First, in 1991 Switzerland was one of the forerunners in Europe on corporate criminal liability. In the meantime the law that entered into force in October 2003 is clearly outdated: Its advantages are that the legislator has in Art. 102 section 2 chosen a viable approach – criminal in nature and objective (independent from individual managerial behavior: one has called it a 'due diligence approach' to corporate liability).<sup>118</sup> However, the concept is unduly restricted to those offences where Switzerland has absolutely committed itself to

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<sup>112</sup> Gless (n 10) 67 et seq.

<sup>113</sup> International Bar Association (n 4) 22.

<sup>114</sup> International Bar Association (n 4) 229 et seq., in particular 262.

<sup>115</sup> Cf. Art. 54 SDÜ (Convention implementing the Schengen Agreement); Art. 4 of the Additional Protocol 7 of the ECHR; Art. 50 of the Charter of Fundamental Rights of the EU; Gless (n 10) 182 et seq.

<sup>116</sup> International Bar Association (n 4) 231 et seq.; Gless (n 10) 350 et seq.

<sup>117</sup> For Switzerland: Art. 3 section 2, Art. 4 section 2, Art. 5 section 3, Art. 6 section 4 and Art. 7 section 5 CC.

<sup>118</sup> Comparable to section 7 of the UK Bribery Act: 'Failure of Commercial Organizations to Prevent Bribery'; Pieth and Ivory (n 13) 393 et seq.

introducing meaningful corporate liability.<sup>119</sup> It is not applicable to most human rights violations in which corporations could get involved and it does not apply even to the most heinous of crimes, including genocide. Here, merely the clearly insufficient section 1 applies. The most obvious and simplest way to correct the deficiency would be to generalize the concept of Art. 102 section 2 CC to all crimes (beyond mere misdemeanors)<sup>120</sup>. This change in substantive law would automatically extend the jurisdictional reach.

The UN Guiding Principles (*Ruggie Principles*), themselves soft law, make it clear that they expect countries to hold corporations responsible for human rights and environmental violation (including child labor or corruption). They are primarily focusing on preventive measures (protect, respect, report). But they also expect states (including home states of parent companies for the behavior of controlled entities abroad) to provide legal remedies and courts for victims to ask for rectification.

The Swiss '*Responsible Business Initiative*' seeks to translate the international standards into hard law. However, the Initiative does not ask for changes in criminal law. Therefore, it remains unclear whether the serious violation one is talking about here (e.g. child labor or illegal logging) would be covered. What is more, the deficits of the current corporate liability regulation have been mentioned. Finally, the extension of jurisdiction to controlled entities abroad is left to practice.

Swiss legal practice would further benefit from additional adaptations, some of which could be achieved by simple change of court practice: There is no real reason to refuse a separate point of attachment for territorial jurisdiction in cases where merely the accessory acts in Switzerland. Such cases are not infrequent (e.g. a lawyer helping a foreign customer to launder money by organizing a web of foreign shell corporations from his Swiss office, whereas the money never reaches Switzerland).

## 6 Conclusion

It has been mentioned (1.) that Switzerland is a hub for multinational companies. What may be seen as a measure of this country's economic success also makes a cluster of substantial risks: One of the foremost financial centers of the world, specialized on private banking, is also particularly attractive for organized criminals, money launderers, for the financing of terrorism and as an abode for autocratic leader to hide their ill-gotten gains. Switzerland has also become one of the prime addresses for commodity traders and markets, it hosts the majority of the world's gold smelters (both including industries linked to high risk); additionally, exposure comes with the specific role in the arms trade (take the Pilatus-planes as the 'poor man's bombers'). The particular concentration of under-regulated International Sports Governors as well as a large arts - and antiquities market combined with free ports add to the risk scenario.

Under these circumstances it is astonishing that Switzerland has introduced a minimalist version of corporate criminal liability, which may be adequate in the area it covers (Art. 102

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<sup>119</sup> Pieth (n 33) 223, 229.

<sup>120</sup> See above n 35.

section 2: for criminal organizations, money laundering, financing of terrorism and corruption), however, blatantly inapt to tackle human rights violations (including homicide, sexual abuse or crimes against humanity) emanating from exporters and multinational corporations domiciled in Switzerland. These deficiencies in substantive law are obviously reflected in the area of jurisdiction. They urgently need to be mended.

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# UNITED STATES' REPORT ON PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW

*By Sara Sun Beale\**

## 1 The general framework for prosecuting corporations under U.S. Law

Although states also have criminal jurisdiction, the federal government plays the dominant role in both corporate criminal liability and the extraterritorial application of U.S. law. This chapter focuses on federal law.

### 1.1 Substantive criminal law

#### 1.1.1 *The respondeat superior standard of liability*

##### *Background.*

Corporations may face criminal liability for violations of federal law by their agents, officers, and employees.<sup>1</sup> In 1909, the United States Supreme Court rejected a constitutional challenge to a federal statute making a corporation liable for the criminal acts of its officers, agents, and employees, and the Court articulated *respondeat superior* as the standard for corporate liability under federal law.<sup>2</sup> Although the question presented in this case was narrow, the Court's decision was written broadly, and the Court's option 'has been understood to be a strong endorsement of corporate criminal liability and the *respondeat superior* test, which is now applied to other federal offenses in all federal courts.'<sup>3</sup> Under this standard, a corporation is liable for offenses committed by the corporation's officers, employees, or agents (a) within the scope of their employment; and (b) at least in part for the benefit of the corporation.<sup>4</sup>

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<sup>1</sup> For more in-depth explanations of corporate criminal liability in general, see generally Charles Doyle, 'Corporate Criminal Liability: An Overview of Federal Law' (2013) Cong Research Serv, R43293 and Joe Albano & Alexander Sanyshyn, 'Corporate Criminal Liability' (2016) 53 Am Crim L Rev 1027.

<sup>2</sup> *NY Cent & Hudson RR v United States*, 212 US 481 (1909). For a description of the case, see Sara Sun Beale, 'The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo' (2016) 46 Stetson L Rev 41, 43–49.

<sup>3</sup> Beale (n 2) 49.

<sup>4</sup> See generally Doyle (n 1) 3, and Sarah N Welling et al, *Federal Criminal Law and Related Actions: Crimes, Forfeiture, the False Claims Act and RICO*, vol 1 (West Group 1998) §§ 5.3-5.5. See *United States v Singh*, 518 F3d 236, 250 (4th Cir 2008) ("[A corporation] is liable for the criminal acts of its employees and agents acting within the scope of their employment for the benefit [of] the corporation and such liability arises if the employee or agent has acted for his own benefit as well as that of his employer.") (citations omitted); *United States v Jorgensen*, 144 F3d 550, 560 (8th Cir 1998) ("A corporation is criminally responsible for the acts of its officers, agents, and employees committed within the scope of their employment and for the benefit of the corporation.") (citations omitted); *United States v Sun-Diamond Growers of Cal*, 138 F3d 961, 970 (DC Cir

### *Scope of Employment.*

In order to impute an individual's criminal act to a corporation, the act must have been done within the scope of the individual's employment. A criminal act need not be specifically directed by the board or management; it need only be 'the type of conduct (making contracts, driving the delivery truck) is authorized.'<sup>5</sup> Liability attaches if the individual has actual or apparent authority to engage in the act in question.<sup>6</sup>

### *Corporate Benefit.*

To hold a corporation liable for an agent's criminal act, that act must also be done in order to benefit the corporation. The agent need not intend the act to primarily benefit the corporation; it is sufficient if the agent acts 'at least in part' to benefit the corporation.<sup>7</sup> An agent's criminal act may benefit a corporation even when the agent violates a company policy.<sup>8</sup>

### *Imputed Intent.*

The intent as well as the acts of corporate agents may be imputed to the corporation.<sup>9</sup> This could take the form of a particular individual's specific knowledge or intent,<sup>10</sup> a conspiracy among employees,<sup>11</sup> or through 'willful blindness' whereby a corporation deliberately disregards criminal activity.<sup>12</sup> Some courts have held that a corporation's *mens rea* can be established by the 'collective knowledge' of its employees.

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1998) ("[A]n agent's acts will not be imputed to the principal in a criminal case unless the agent acts with the intent to benefit the principal.").

<sup>5</sup> United States v Potter, 463 F3d 9, 25 (1st Cir 2006). See also United States v Agosto-Vega, 617 F.3d 541, 25 (1st Cir 2010) ("The test is whether the agent is performing acts of the kind which he is authorized to perform . . . .") (internal quotations omitted).

<sup>6</sup> See United States v Inv Enters, 10 F3d 263, 266 (5th Cir 1993) ("[A] corporation is criminally liable for the unlawful acts of its agents, provided that the conduct is within the scope of the agent's authority, whether actual or apparent."). An individual has actual authority if a corporation knowingly and intentionally authorizes her to act on its behalf, whereas an agent acts with apparent authority if a third party reasonably believes she has the authority to act.

<sup>7</sup> Potter, 463 F3d at 25 ("[T]he test [of corporate criminal liability] is whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated—at least in part—by an intent to benefit the corporation.") (internal quotations omitted).

<sup>8</sup> See United States v Portac, Inc, 869 F2d 1288, 1293 (9th Cir 1989) (affirming corporate conviction despite supervisor's express admonition to agent that company policy forbid violations of law).

<sup>9</sup> See United States v A&P Trucking Co, 358 US 121, 125 ("[I]t is elementary that such impersonal entities can be guilty of 'knowing' or 'willful' violations of regulatory statutes through the doctrine of respondent superior."); United States v Philip Morris USA, Inc, 566 F3d 1095, 1118 (DC Cir 2009) ("Corporations may be held liable for the specific intent offenses based on the 'knowledge and intent' of their employees.").

<sup>10</sup> See, eg, Sun-Diamond, 138 F3d at 970 (holding that there was "adequate evidence for imputation" where an employee intended to "further the interests of his employer").

<sup>11</sup> See, eg, Inv Enters, 10 F3d at 266–67 (upholding that conspiracy involving company president imputed *mens rea* to corporation).

<sup>12</sup> See, eg, AE Staley Mfg Co v Sec'y of Labor, 295 F3d 1341, 1350–53 (DC Cir 2002) (holding that corporate defendant had knowledge of OSHA violations through "willful blindness" doctrine); United States v Bank of

### 1.1.2 General applicability of corporate liability

Federal criminal statutes are generally applicable to corporations. The Dictionary Act defines commonly used terms throughout the United States Code and by its terms provides: ‘In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words ‘person’ or ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.’<sup>13</sup>

Courts have relied on the Dictionary Act’s inclusive definition to give meaning to the words ‘person’ or ‘whoever’ in the context of criminal statutes.<sup>14</sup> Although some federal regulatory statutes do specifically include corporations as being subject to the law,<sup>15</sup> the Dictionary Act provides the default rule that a statute need not specifically include terms extending liability to corporations.

## 1.2 Procedures governing criminal prosecution of corporations

### 1.2.1 Charging

The initiation of federal criminal charges is governed by the U.S. Attorneys’ Manual (USAM), particularly the Principles of Federal Prosecution.<sup>16</sup> A federal prosecutor may not initiate criminal charges unless the prosecutor believes that the person’s conduct constitutes a federal offense, that the admissible evidence will probably be sufficient to obtain and sustain a conviction, and that a substantial federal interest would be served by the prosecution.<sup>17</sup>

Specific provisions of the USAM govern charging corporations and other legal entities.<sup>18</sup> Although *respondeat superior* does not require a showing that a corporation was at fault in employing or supervising its agent and employees, the USAM ‘make[s] it clear that federal prosecutors should not bring criminal charges merely because a case can be made on the basis of respondeat superior,’ and requires prosecutors to ‘consider a variety of factors that identify corporate blameworthiness and assess the adequacy of alternatives to federal prosecution . . .’<sup>19</sup> These factors include the pervasiveness of the wrongdoing within the corporation, the corporation’s history of misconduct, the impact of any compliance programs, the timeliness and voluntariness of a corporation’s disclosure of wrongdoing, and

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New Eng, 821 F2d 844, 856–57 (1st Cir 1987) (holding bank criminally liable for knowingly and willingly disregarding federal filing and reporting requirements).

<sup>13</sup> 1 USC § 1 (2012).

<sup>14</sup> See *A&P Trucking Co*, 358 US at 123 (addressing corporate violation of Interstate Commerce Commission safety regulations).

<sup>15</sup> See, eg, 15 USC § 78c(a)(1), (9) (2012); 21 USC § 321(e) (2012).

<sup>16</sup> See US ATTORNEYS’ MANUAL [hereinafter USAM] §§ 9-27.000 *et seq.* (US Dep’t of Justice) (“Principles of Federal Prosecution”).

<sup>17</sup> USAM § 9-27.220[A].

<sup>18</sup> See USAM § 9-28.000 (“Principles of Federal Prosecution of Business Organizations”).

<sup>19</sup> Beale (n 2) 50–51 (footnotes omitted).

whether the corporation cooperated with or obstructed law enforcement, or paid any restitution.<sup>20</sup>

Although federal prosecutions for felony offenses must ordinarily be initiated by grand jury indictment, some lower courts have held that the Fifth Amendment grand jury clause does not apply to corporations, since they cannot be imprisoned.<sup>21</sup> But Rule 7 of the Federal Rules of Criminal Procedure draws no distinction between individual and corporate defendants, and requires both to be prosecuted by an indictment for any offense punishable by an imprisonment of more than one year, unless the defendant waives this protection.<sup>22</sup>

Although an arrest warrant will be issued to initiate proceedings against an individual defendant who has been charged, the Federal Rules of Criminal Procedure provide for the issuance of a summons to initiate proceedings against an organizational defendant,<sup>23</sup> and they include detailed provisions governing service on foreign corporations.<sup>24</sup>

### 1.2.2 *Constitutional protections*

Corporations enjoy many, but not all constitutional protections applicable to individual defendants. Corporations do not enjoy a Fifth Amendment privilege against self-incrimination,<sup>25</sup> but they are entitled to the protection of many rights secured by the Due Process clause, including the right to challenge the court's personal jurisdiction, and the right to be heard before being deprived of a protected interest in liberty or property.<sup>26</sup> Although there is little authority on point, it appears that corporations are also entitled to the protection of the Double Jeopardy clause, the right to trial by jury, the right to confrontation and cross examination of witnesses, and other core procedural protections at trial.<sup>27</sup>

At various stages, however, the Federal Rules vary procedures applicable to organizational defendants from those applicable to other defendants or make special provision for organizational defendants.

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<sup>20</sup> USAM §§ 9-28.300, 9-28.730.

<sup>21</sup> See generally Sara Sun Beale et al, *Grand Jury Law and Practice*, vol 2 (2016 supp, 2nd edn, 1997) § 8.1 (citing cases), and Doyle (n 1) 15–16 (same).

<sup>22</sup> Fed R Crim P 7(a).

<sup>23</sup> See Fed R Crim P 4 (a) (outlining procedure to summon an organizational defendant).

<sup>24</sup> See Fed R Crim P 4 (c)(3)(C) (summarizing procedure for service on organizational defendant in a judicial district of the United States) and (D) (setting forth procedure for service on organizational defendant not within the United States).

<sup>25</sup> *Hale v Henkel*, 201 US 43, 70 (1906). Similarly, the Court has held that other collective entities, such as labor unions and partnerships, may not assert the privilege against self-incrimination. Joshua Dressler & Alan C Michaels, *Understanding Criminal Procedure*, vol 2 (4th edn 2006) § 12.04[A]. For a more detailed overview on the Fifth Amendment privilege and corporations, see Charles A Wright & Arthur R Miller, *Federal Practice & Procedure*, vol 2 (4th edn 2008) § 276.

<sup>26</sup> See Doyle (n 1) 16–17.

<sup>27</sup> *ibid* 17–20.

### 1.2.3 Pretrial discovery

The Rules adjust the general requirements that government disclose before trial any relevant oral, written, or recorded statements made by the defendant. For organizational defendants, the government is required to disclose statements only if the government contends that the statement's author was a director, officer, employee, or agent of the defendant corporation and could (i) legally bind the defendant regarding the statement's subject, or (ii) legally bind the defendant regarding an allegedly criminal act in which the author was personally involved.<sup>28</sup>

### 1.2.4 Plea proceedings

If an organizational defendant fails to appear after being summoned, the court must enter a plea of not guilty.<sup>29</sup>

### 1.2.5 Presence at trial and legal representation

In general, a defendant charged with a felony must be present at all times during a criminal trial, though a trial may continue if the defendant who is initially present voluntarily absents himself.<sup>30</sup> In contrast, however, a corporation is represented in court by counsel; its officers, directors, or employees need not be present.<sup>31</sup>

### 1.2.6 Trial in absentia

Federal law makes no provision for trying corporations – or other defendants – in absentia if the defendant is not present when the trial begins.<sup>32</sup>

The Rules of Criminal Procedure do, however, allow a trial to continue if a defendant who was present initially is deemed to have waived the right to be present either by voluntarily absenting himself during the trial, or by disruptive behaviour that requires removal from the courtroom.<sup>33</sup> Since the presence of counsel alone suffices for a corporation to be present, the trial of a corporation could continue if counsel were present at the outset of the trial but later was 'voluntarily absent' from the trial.

The Federal Rules were amended in 2016 to address the situation in which a corporate defendant who has been served fails to appear in response to a summons; the amendment states that under those circumstances 'a judge may take any action authorized by United States law.'<sup>34</sup> The accompanying committee note states that '[t]he rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to

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<sup>28</sup> Fed R Crim P 16(a)(1)(C).

<sup>29</sup> Fed R Crim P 11(a)(4).

<sup>30</sup> Fed R Crim P 43(a), (c).

<sup>31</sup> See Fed R Crim P 43(b) ("A defendant need not be present . . . [if t]he defendant is an organization represented by counsel who is present.")

<sup>32</sup> In *Crosby v United States*, 506 US 255, 262 (1993), the Supreme Court held that Rule 43 prohibits trial in absentia of a defendant who is not present at the beginning of a trial.

<sup>33</sup> Fed R Crim P 43(c).

<sup>34</sup> Fed R Crim P 4(a).

appear.<sup>35</sup> It seems very doubtful that a federal court would interpret this provision to permit trial in absentia.

### 1.2.7 *Building and initiating cases against individual and corporate defendants*

Although there are no differences between the procedures for building cases against individual or corporate defendants, there is a difference in the procedure for initiating prosecutions. A corporate prosecution is initiated by the service of a summons, and the Federal Rules contain detailed provisions on how such a summons may be served on a corporation that is not headquartered in and does not have its principal place of business in the United States.<sup>36</sup> Individual prosecutions would ordinarily be initiated by an arrest warrant,<sup>37</sup> but that procedure is not feasible when an individual defendant is outside the United States; unless an individual defendant voluntarily enters the U.S., extradition is required.

## 1.3 CCR statistics

The United States Sentencing Commission publishes yearly statistics on corporations that have been convicted of federal criminal offenses. Between 2007 and 2015 the government reported fewer than two hundred corporations convicted per year of federal crimes.<sup>38</sup> These statistics include the most serious federal offense for which the corporation was convicted,<sup>39</sup> but they provide no other information on matters such as whether the corporation was organized or headquartered outside the United States, or was prosecuted for extraterritorial conduct. The government does not provide statistics on corporate *Deferred Prosecution Agreements (DPAs)* and *Non-Prosecution Agreements (NPAs)*, though private firms and scholars maintain databases.<sup>40</sup>

No statistics are compiled in the United States regarding prosecutions or convictions for violations of international law outside the U.S. court system.

## 1.4 Public debate on corporate social responsibility

The accountability of corporations and their compliance with the law and ethical standards have been subject to recent debate in the United States. Some critics have argued that

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<sup>35</sup> *ibid* subdivision a.

<sup>36</sup> Fed R Crim P 4(c)(3)(D).

<sup>37</sup> *See* Fed R Crim P 4(a).

<sup>38</sup> *See* Beale (n 2) 56 & n. 80 (citing Sentencing Commission data).

<sup>39</sup> *See, eg*, US Sentencing Comm'n, *2015 Sourcebook of Federal Sentencing Statistics—Table 51* <<http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table51.pdf>> accessed 30 October 2016 (detailing organizational crimes of conviction and punishment imposed).

<sup>40</sup> *See, eg*, Gibson, Dunn & Crutcher LLP, *2015 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)* (5 January 2016), <[http://www.gibsondunn.com/publications/Pages/2015-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx#\\_ftnref2](http://www.gibsondunn.com/publications/Pages/2015-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx#_ftnref2)> accessed 12 March 2017 (showing figures based on the yearly totals in chart 1). For the years 2001–2012, Brandon Garrett has identified 255 DPAs and NPAs. Brandon L Garrett, 'The Corporate Criminal As Scapegoat' (2015) 101 Va L Rev 1790, 1800.

corporate criminal liability is unnecessary because civil liability performs the same function as corporate criminal liability<sup>41</sup> and because corporations, unlike people, cannot understand punishment.<sup>42</sup> Other critics argued that the current system of *respondeat superior* liability is overly broad.<sup>43</sup> Critics have also argued that corporate criminal liability has given prosecutors too much power, enabling the prosecutors to act as regulators who have the power to force corporations to enter into settlements or make structural changes rather than face a criminal conviction.<sup>44</sup>

As a practical matter, however, the *U.S. Department of Justice (DOJ)* and the Sentencing Commission have reshaped the implementation of corporate criminal liability in a manner that substantially reduces the pressure for reform. Administrative restrictions on charging corporate criminal liability and revised guidelines for sentencing corporations have substantially restricted the real scope of corporate liability and reduced the pressure for doctrinal or legislative change.<sup>45</sup>

Although the administrative restriction of corporate liability responded to the charge that *respondeat superior* was overbroad and unjust, there was widespread criticism of the Justice Department's actions in the wake of the financial crisis of 2008. Many critics thought that there should have been more criminal prosecutions following the crisis.<sup>46</sup> *Eric Holder*, Attorney General from 2009 to 2015, faced criticism that he was too lenient with corporations.<sup>47</sup> Holder testified before Congress that he was troubled by the economic implications of prosecuting some of the big financial institutions that had caused the financial crisis. He said, 'I am concerned that the size of some of these institutions becomes so large that . . . if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy.'<sup>48</sup> These statements, along with the closure of criminal investigations without filing charges against *AIG*, *Lehman Brothers*, and *Countrywide*, led to the impression that *Holder* was not actively holding banks responsible because of their import to the economy.

More recently, the *DOJ* has entered into numerous settlements with corporations following high-profile scandals. For example, in 2014 and 2015, the *DOJ* brought prosecutions against

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<sup>41</sup> See, eg, VS Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109 Harv L Rev 1477, 1534.

<sup>42</sup> See, eg, Albert W Alschuler, 'Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand' (1991) 71 BU L Rev 307, 311–12.

<sup>43</sup> See, eg, Pamela H Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 Minn L Rev 1095, 1105 ("the traditional respondeat superior standard . . . provides for inappropriately broad liability.").

<sup>44</sup> Jennifer Arlen, 'Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms' in Anthony S Barkow & Rachel E Barkow (eds), *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* 62, 66–81 (2011).

<sup>45</sup> See Beale (n 2) 50–61.

<sup>46</sup> *ibid* 62–63.

<sup>47</sup> Peter J Henning, 'Attorney General Eric Holder's Mixed Scorecard' *NY Times* (28 April 2015), <<http://nyti.ms/1HUBUhp>> accessed 12 March 2017.

<sup>48</sup> *ibid*.

several financial institutions – including *Credit Suisse*,<sup>49</sup> *Barclays*, and *JP Morgan Chase*<sup>50</sup> – for currency price rigging. Between 2014 and 2017 DOJ settled criminal charges against a trio of major automakers. *Toyota* and *General Motors*, which misled consumer and regulators about safety issues, entered into DPAs requiring that they pay billions in criminal fines.<sup>51</sup> *Volkswagen* plead guilty to (1) conspiracy to defraud the United States, engage in wire fraud, and violate the Clean Air Act; (2) obstruction of justice; and (3) importation of merchandise by means of false statements for conduct related to the motor vehicle emissions scandal; it agree to pay a \$ 2.8 billion penalty.<sup>52</sup>

The criticism of the *Holder* administration set the stage for a reassessment of prosecutorial policies and practices. Under *Holder's* successor, Attorney General *Loretta Lynch*, the DOJ issued new guidance that reemphasized the importance of prosecuting the responsible individuals when corporate wrongdoing occurs.<sup>53</sup>

Initially, *President Trump's* Attorney General, *Jeff Sessions*, stated the Department would continue to prosecute 'laws regarding corporate misconduct, fraud, foreign corruption and other types of white-collar crime.'<sup>54</sup> However, senior Department officials later stated that they anticipated making some changes in the Department's policies regarding individual and corporate prosecutions.<sup>55</sup>

Because the United States is not a member of the ICC, there has been no significant debate in this country about the exclusion of corporate criminal responsibility from Article 25 of the

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<sup>49</sup> Ben Protess & Jessica Silver-Greenberg, 'Credit Suisse Pleads Guilty in Felony Case' *NY Times* (19 May 2014) <<http://dealbook.nytimes.com/2014/05/19/credit-suisse-set-to-plead-guilty-in-tax-evasion-case/>> accessed 12 March 2017.

<sup>50</sup> Michael Corkery & Ben Protess, 'Rigging of Foreign Exchange Market Makes Felons of Top Banks' *NY Times* (20 May 2015) <<http://www.nytimes.com/2015/05/21/business/dealbook/5-big-banks-to-pay-billions-and-plead-guilty-in-currency-and-interest-rate-cases.html>> accessed 12 March 2017.

<sup>51</sup> Dep't Justice, Office of Public Affairs, 'Justice Department Announces Criminal Charge Against Toyota Motor Corporation and Deferred Prosecution Agreement with \$1.2 Billion Financial Penalty' (19 March 2014) <<https://www.justice.gov/opa/pr/justice-department-announces-criminal-charge-against-toyota-motor-corporation-and-deferred>> accessed 12 March 2017; Danielle Ivory & Bill Vlasic, '\$900 Million Penalty for G.M.'s Deadly Defect Leaves Many Cold' *NY Times* (17 September 2015) <<http://www.nytimes.com/2015/09/18/business/gm-to-pay-us-900-million-over-ignition-switch-flaw.html>> accessed 12 March 2017.

<sup>52</sup> Dep't Justice, Office of Public Affairs, 'Volkswagen AG Pleads Guilty in Connection with Conspiracy to Cheat U.S. Emissions Tests' (10 March 2017) <<https://www.justice.gov/opa/pr/volkswagen-ag-pleads-guilty-connection-conspiracy-cheat-us-emissions-tests>> accessed 17 March 2017. See also Hiroko Tabuchi, 'Volkswagen Faces Long Road Ahead, Even After a Civil Settlement' *NY Times* (26 June 2016) <<http://www.nytimes.com/2016/06/27/business/volkswagen-faces-long-road-ahead-even-after-a-civil-settlement.html>> accessed 12 March 2017 (describing related civil settlement).

<sup>53</sup> See Beale (n 2) 63–68.

<sup>54</sup> Jeff Sessions, Att'y Gen, Remarks at Ethics and Compliance Initiative Annual Conference (April 24, 2017) <<https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual>>.

<sup>55</sup> Cogan Schneier, DAG Rosenstein: Changes Coming 'in the Near Future' to Yates Memo (Sept 14, 2017), <http://www.law.com/sites/almstaff/2017/09/14/dag-rosenstein-changes-coming-in-the-near-future-to-yates-memo/>

International Criminal Court statute. Debate continues over the United States' relationship with the ICC,<sup>56</sup> and the relationship between the United States and the ICC has been less hostile in recent years.<sup>57</sup>

## 2 The U.S. approach to jurisdiction

The foreign relations law of the United States divides jurisdiction into three categories: jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce.<sup>58</sup>

### 2.1 The U.S. constitutional structure

The Constitution delegates only enumerated powers to the federal government, and those powers authorize Congress to prescribe the offenses that may be adjudicated in the federal courts. Article I gives Congress constitutional authority to prescribe crimes committed domestically and overseas. Under Article I, Congress has the authority to 'regulate commerce with foreign nations,'<sup>59</sup> to 'define and punish piracies and felonies committed on the high seas, and offenses against the law of nations,'<sup>60</sup> to provide for national defense and general welfare,<sup>61</sup> and to make laws that are 'necessary and proper' for executing its other enumerated constitutional powers.<sup>62</sup>

The U.S. constitution sets the outer limits for jurisdiction in the federal courts. Article III vests federal judicial power in the Supreme Court and 'such inferior courts as the Congress may from time to time ordain and establish,'<sup>63</sup> and Article I provides that Congress has the authority to constitute tribunals inferior to the Supreme Court.<sup>64</sup> Under these provisions, Congress has the authority to establish the federal trial courts and determine their jurisdiction. By statute, Congress has provided that the federal district courts have 'original jurisdiction, exclusive of the courts of the states, of all offense against the laws of the United States.'<sup>65</sup> Because there are no federal common law crimes,<sup>66</sup> the effective scope of federal criminal jurisdiction is determined by the criminal statutes enacted by Congress and their

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<sup>56</sup> Compare Brett D Schaefer & Steven Groves, 'The U.S. Should Not Join the International Criminal Court' (*The Heritage Foundation*, 18 August 2009) <<http://www.heritage.org/research/reports/2009/08/the-us-should-not-join-the-international-criminal-court>> with Paul Szasz, 'The United States Should Join the International Criminal Court' (1998–1999) 9 *AF Acad J Legal Stud* 1–32.

<sup>57</sup> See Marlise Simons, 'U.S. Grows More Helpful to International Criminal Court, a Body It First Scorned' *NY Times* (2 April 2013) <<http://www.nytimes.com/2013/04/03/world/europe/us-assists-international-criminal-court-but-still-has-no-intention-of-joining-it.html>> accessed 12 March 2017.

<sup>58</sup> See Restatement (Third) of the Law of Foreign Relations § 401 (Am. Law Inst 1986) [hereinafter Restatement (Third)]; Restatement (Fourth) The Foreign Relations Law of the United States: Jurisdiction § 101 (Tentative Draft No 3, approved May 22, 2017). Because Tentative Drafts No 2 and 3 were approved May 22, 2017, subsequent references to the sections presented in those drafts will be simply to the Restatement (Fourth).

<sup>59</sup> US CONST, art I, § 8, cl 3.

<sup>60</sup> US CONST, art I, § 8, cl 10.

<sup>61</sup> US CONST, art I, § 8, cl 1.

<sup>62</sup> US CONST, art I, § 8, cl 18.

<sup>63</sup> U.S. Const., Art. III, sec.1.

<sup>64</sup> U.S. Const., Art. I, sec. 8.

<sup>65</sup> 18 U.S.C. § 3231.

<sup>66</sup> *United States v Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

interpretation by the federal courts. Congress also establishes the federal courts' jurisdiction to hear civil cases by creating causes of action over which the courts have jurisdiction, or by authorizing federal jurisdiction over common law causes of action.

A statutory grant of authority is a prerequisite to the exercise of jurisdiction over both federal prosecutions and civil cases. All federal offenses must be defined by statute.<sup>67</sup> Thus federal jurisdiction to adjudicate depends upon the enactment of an offense that may be prosecuted in the federal courts. The effective scope of jurisdiction over transnational crime depends upon (1) Congressional enactments, and (2) the federal courts' interpretation of statutes that may confer extraterritorial jurisdiction.

## 2.2 Forms of jurisdiction recognized by U.S. law

The foreign relations law of the United States recognizes three forms of jurisdiction: jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce.<sup>68</sup> Prescriptive jurisdiction is the jurisdiction to prohibit conduct by enacting criminal statutes.

## 2.3 Prescriptive jurisdiction in the United States

The legislation enacted by Congress and its interpretation by the courts reflect a recognition of five bases for asserting prescriptive jurisdiction:

- Territoriality – conduct occurring within the country's territory, or designed to have effects within the country's territory.
- Nationality (also called active personality) – conduct performed by the country's nationals.
- Passive personality – conduct having the country's nationals as its victims.
- Protective principle – conduct directed against a country's vital interests.
- Universality – conduct recognized by the community of nations as of 'universal concern.'<sup>69</sup>

## 2.4 Territorial jurisdiction

It is well established that the United States exercises jurisdiction to prescribe with respect to conduct that occurs within its territory,<sup>70</sup> and U.S. statutes are presumed to apply in United States territory.<sup>71</sup>

In the Anglo-American tradition, criminal cases were regarded as local and punishable only in the country where they were committed. Indeed, an early English case stated 'Crimes are in their nature local, and the jurisdiction of crimes is local.' As one author summarized the basis of the traditional common law rule:

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<sup>67</sup> *United States v Hudson & Goodwin*, 11 US (7 Cranch) 32, 34 (1812).

<sup>68</sup> See Restatement (Third) § 401; Restatement (Fourth) § 101.

<sup>69</sup> See Restatement (Fourth) § 201; Restatement (Third) §§ 402, 404 & comments (1987).

<sup>70</sup> *Restatement (Fourth) § 201(1)(a) & cmt E. See also Am Soc'y Int'l L, 'Jurisdictional, Preliminary, and Procedural Concerns' Benchbook on International Law § II.A-2* (Diane Marie Amann ed. 2014) <[www.asil.org/benchbook/jurisdiction.pdf](http://www.asil.org/benchbook/jurisdiction.pdf)> accessed 12 March 2017.

<sup>71</sup> *ibid* II.A-6.

It has been suggested that historically the refusal to punish crimes save at and by the law of the place of the offense grew out of two conditions, among others: (1) The community's direct responsibility for offenses committed within its borders, such as the fine for murder imposed on the hundred, or the liability of the tithing group for the crimes of all members of the tithing under the frank-pledge system, and (2) the origin of the jury as a trial body, it being at first a group of men deciding cases on the basis of their own knowledge of the facts and the sense of the community in which the acts occurred, therefore necessarily drawn from that community. But historical explanations drawn from medieval times, however correct they may be, are not very satisfying. The decided cases themselves sometimes suggest that the limitation is due to the sovereign nature of independent states, and the fear that interference with the prerogatives of a proud foreign sovereignty might produce disagreeable international complications. Assuming that sovereigns guard jealously their [self-created] power to punish crimes committed within their borders and assuming that crimes are to be treated as offenses against the political sovereign as such, rather than as occasions for corrective treatment of wrongdoers and protection of the public generally from their anti-social acts, it is easy to see that as between nations this point should have much weight.<sup>72</sup>

This concept has been deemed so fundamental as to require no further justification.

Two additional bases of extraterritorial jurisdiction have been derived from the principle of territoriality, both of which rely on interests or concerns within the United States to justify exercising jurisdiction outside of the United States.<sup>73</sup>

First, under the effects doctrine, acts performed outside a jurisdiction, but 'intended to produce and producing detrimental effect' within the jurisdiction, may be punished as if the actor had been present at the place of the effect.<sup>74</sup> Thus, the United States may 'impose liabilities' on citizens or non-citizens for conduct outside of United States borders that has consequences within its borders.<sup>75</sup> The Restatement (Third) of the Law of Foreign Relations states that the U.S. has prescriptive jurisdiction over 'conduct outside its territory that has or is intended to have substantial effect within its territory.'<sup>76</sup> This concept is carried forward in the Restatement (Fourth), which allows prescriptive U.S. jurisdiction over 'conduct that has a substantial effect within its territory.'<sup>77</sup>

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<sup>72</sup> Robert A. Leflar, 'Extrastate Enforcement of Penal and Governmental Claims' (1932) 46 Harv L Rev 193, 19-99.

<sup>73</sup> Amann (n 70) II.A-6-II.A-8.

<sup>74</sup> *Strasheim v Dailey*, 221 US 280, 285 (1911).

<sup>75</sup> *United States v Aluminum Co of America*, 148 F2d 416, 443 (2d Cir 1945); *see also* *Hartford Fire Ins Co v California*, 509 US 764, 796 (1993) ("[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

<sup>76</sup> Restatement (Third) § 402(1)(c).

<sup>77</sup> Restatement (Fourth) § 201(1)(b).

Although some scholars characterize the U.S. approach as ‘objective territoriality’,<sup>78</sup> a recent article concluded:

Most courts and scholars conflate or fail to distinguish between the objective territoriality and effects-based principles. Often, court dicta will indicate that prescriptive jurisdiction is justified by objective territoriality when the facts of the case indicate that the effects principle should govern.<sup>79</sup>

The Supreme Court’s recent decisions do not analyze jurisdiction using the terms objective and subjective territoriality. Instead, the Court has instructed the courts interpreting federal statutes to follow a two-step process. The first step is to determine whether Congress intended the law in question to have extraterritorial jurisdiction; in so doing, the courts are to apply a presumption against giving a federal statute extraterritorial effect.<sup>80</sup> But if the court determines that Congress did not intend the law in question to have extraterritorial effect, the second step is to determine whether the case in question involves a domestic application of the law, based upon what the court determines to be the ‘focus’ of the statute in question.<sup>81</sup> The focus of a statute may, or may not, involve effects in the United States. Commentators have argued that this allows the courts to treat regulation of foreign activity as domestic regulation, undermining the presumption against the extraterritorial application of U.S. laws.<sup>82</sup>

Second, with respect to criminal laws, Congress has defined the term ‘United States’ when used in a territorial sense to include ‘all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone.’<sup>83</sup> Additionally, Congress has defined the ‘special maritime and territorial jurisdiction of the United States’ to include, inter alia, certain vessels and aircraft, lands reserved to or acquired for use by the United States, and offense committed against U.S. nationals in diplomatic or military premises or residences.<sup>84</sup>

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<sup>78</sup> Susan Emmenegger, ‘Extraterritorial Economic Sanctions and Their Foundations in International Law’ (2016) 33 *Ariz J Int’l & Comp L* 631, 646.

<sup>79</sup> Paul N Stocktona & Michele Golabek-Goldman, ‘Prosecuting Cyberterrorists: Applying Traditional Jurisdictional Frameworks to a Modern Threat’ (2014) 25 *Stan L & Pol’y Rev* 211, 236. The Third and Fourth Restatements reflect different views. Compare *Restatement (Fourth)* § 201 cmts. e & f (describing separately jurisdiction based on territory and effects), with *Restatement (Third)* § 402 cmt. d (stating “Jurisdiction with respect to activity outside the state, but having or intended to have substantial effect within the state’s territory, is an aspect of jurisdiction based on territoriality, although it is sometimes viewed as a distinct category.”).

<sup>80</sup> *Morrison v Nat Austl Bank*, 561 US 247, 255 (2010).

<sup>81</sup> See *ibid* 266 (examining whether the focus of the law at issue was domestic).

<sup>82</sup> Austen L Parris, ‘Evading Legislative Jurisdiction’ (2012) 87 *Notre Dame L Rev* 1673, 1699–1700.

<sup>83</sup> 18 USC § 5 (2012).

<sup>84</sup> 18 USC § 7 (2012).

## 2.5 Extraterritorial jurisdiction

### 2.5.1 *Active personality (nationality) principle: generally*

The United States exercises active personality jurisdiction on the basis of the nationality or residence of the person being regulated.<sup>85</sup> The Supreme Court has long recognized that international law permits the United States to govern the conduct of its own citizens and nationals in foreign countries.<sup>86</sup> A wide variety of offenses are now based on jurisdiction over U.S. nationals, including ‘use of chemical weapons,’ ‘genocide,’ ‘economic espionage,’ ‘bombing public places,’ and ‘violence against maritime fixed platforms.’<sup>87</sup>

### 2.5.2 *Corporations and the active personality principle*

U.S. law recognizes active personality as a basis for jurisdiction over both natural persons and corporations. The United States exercises jurisdiction over corporations that have been incorporated in the United States, or have their principal places of business in the United States, or both.<sup>88</sup>

Furthermore, for limited purposes a foreign-incorporated subsidiary of an American company may be subject to United States regulations based on the nationality of its parent company per the active personality principle.<sup>89</sup> This concept has spurred significant controversy in attempts to compel foreign subsidiaries to comply with United States embargos and export control regulations.<sup>90</sup>

### 2.5.3 *The U.S. Military and the active personality principle*

Article I of the Constitution grants Congress broad powers to raise, support and make rules for the regulation of the armed forces, and the Supreme Court has construed this authority broadly to include the authority to decide ‘what shall constitute military offenses, and

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<sup>85</sup> Restatement (Fourth) § 201(1)(c).

<sup>86</sup> For example, in *Blackmer v United States* 284 U.S. 421, 436 (1932), the Court stated that “[b]y virtue of the obligations of [his] citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country.” See also *Skiriotes v Florida*, 313 US 69, 73 (1941) (stating “the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed”).

<sup>87</sup> See Restatement (Fourth) § 201, Reporters’ Note 7 (collecting statutes).

<sup>88</sup> *ibid* § 201, cmt. g (stating “With respect to corporations and other juridical persons, U.S. statutes typically exercise active-personality jurisdiction based on the juridical person’s organization under U.S. law, principal place of business within the United States, or both.”). See also *ibid* Reporters’ Note 7 (collecting statutes basing jurisdiction on these criteria and noting other statutes that base jurisdiction on corporations on the ground that they are owned or controlled by U.S. nationals).

<sup>89</sup> Restatement (Third) § 414. This provision was not, however, carried over into the jurisdictional provisions of the Restatement Fourth, which were approved on May 22, 2017.

<sup>90</sup> Am Soc’y Int’l L, ‘Jurisdictional, Preliminary, and Procedural Concerns’ in Diane Marie Armann (eds), *Benchbook on International Law* §§ II.A-9–II.A-10 (2014) <[www.asil.org/benchbook/jurisdiction.pdf](http://www.asil.org/benchbook/jurisdiction.pdf)> accessed 12 March 2017.

prescribe their punishment.<sup>91</sup> Members of the Armed Forces are subject to court martial for conduct both within the United States and abroad. Court martial proceedings take place in military courts created under Article I, which are distinct from the civilian federal courts created by Congress under Article III. Military courts operate under the *Uniform Code of Military Justice (UCMJ)*.<sup>92</sup>

#### 2.5.4 *Military Contractors and the active personality principle*

Concern about the expanding role of military contractors led Congress to extend both civilian and military jurisdiction to contractors under certain circumstances. In 2000, Congress enacted legislation subjecting military contractors to United States criminal laws for felonies committed abroad, providing jurisdiction over crimes committed by persons 'while employed by or accompanying the Armed Forces outside the United States.'<sup>93</sup> Congress defined the term 'employed by the Armed Forces outside the United States' to include any Department of Defense 'contractor (including a subcontractor at any tier)' or 'employee of a contractor (or subcontractor at any tier)'.<sup>94</sup> Federal prosecutors found it difficult to prosecute cases against contractors arising overseas in combat in the civilian courts under the new provision.<sup>95</sup> Accordingly, in 2006 Congress extended the authority of military commanders to prosecute certain defense contractors by court martial.<sup>96</sup> As amended, the UCMJ now expands the reach of military law to 'persons serving with or accompanying an armed force in the field . . . [i]n time of declared war or a contingency operation.'<sup>97</sup> The focus of this legislation and the resulting prosecutions has been on the conduct of individuals, rather than corporate entities.

#### 2.5.5 *Passive personality principle: generally*

Under the principle of passive personality the United States exercises jurisdiction over 'certain conduct outside its territory that harms its nationals.'<sup>98</sup> The United States has exercised jurisdiction on this basis for offenses including murder, hostage taking, terrorism, and weapons of mass destruction.<sup>99</sup> For example, passive personality supported jurisdiction over foreign attacks against U.S. nationals, government officials, or government property.<sup>100</sup> In general, U.S. passive personality statutes do not require that the victims have been

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<sup>91</sup> Adam R Pearlman, 'Applying the UCMJ to Contractors in Contingency Operations' (2016) 6 Am U Nat'l Security L Brief, No 1, at 1,4 (*quoting* In re Tarble, 80 US 397, 408 (1871)).

<sup>92</sup> See *ibid* 6.

<sup>93</sup> 18 USC § 3261 (A)(1) (2012).

<sup>94</sup> 18 USC § 3267(1)(A)(i),(ii), (iii) (2012).

<sup>95</sup> See Pearlman (n 91) 2-3 (describing background and effect of Military Extraterritorial Jurisdiction Act of 2000).

<sup>96</sup> *ibid* 1-3 (describing Congressional concerns and amendment of § 802(a)(10) of the UCMJ).

<sup>97</sup> 10 USC § 802(a)(10) (2012).

<sup>98</sup> See Restatement (Fourth) § 201(1)(d) & cmt. h.

<sup>99</sup> *ibid* cmt. h. For a list of offenses based on passive personality, see *ibid*, Reporters' Note 8.

<sup>100</sup> See Restatement (Third) § 402(2) comment g; see also *United States v Benitez*, 741 F2d 1312, 1316-17 (11th Cir 1984) (discussing the passive personality principle when approving prosecution of a Columbian citizen for shooting United States agents in Columbia), *cert denied*, 471 US 1137 (1985).

targeted because of U.S. nationality.<sup>101</sup> The Omnibus Diplomatic Security and Antiterrorism Act of 1986<sup>102</sup> makes any murder and physical violence committed against United States nationals abroad a felony, but it includes an unusual prerequisite. No prosecution for this offense may be brought without a written certification by the Attorney General or highest ranking subordinate of the Attorney General with responsibility for the prosecution of the official's belief that offense 'was intended to coerce, intimidate, or retaliate against a government or a civilian population'.<sup>103</sup>

The United States has exercised passive personality jurisdiction to create civil liability under the Anti-Terrorism Act<sup>104</sup> and the *Foreign Sovereign Immunities Act* exception for state sponsors of terrorism.<sup>105</sup>

### 2.5.6 Corporations and the passive personality principle

The offenses that rest on passive personality, like other federal offenses, are subject to the general rules of construction that make federal criminal statutes applicable to corporations as well as individuals.<sup>106</sup> As noted above, many non-economic offenses, such as murder and hostage taking are based on passive personality.<sup>107</sup>

The United States exercises jurisdiction over corporations that have been incorporated in the United States, or have their principal places of business in the United States, or both.<sup>108</sup>

The *Helms-Burton Act* is an example of a law specifically aimed at protecting the property of U.S. 'victims' abroad from theft. The Act created a private right of action for U.S. citizens against anyone who 'traffics in property which was confiscated by the Cuban Government on or after January 1, 1959'.<sup>109</sup> Generally, the United States disfavours secondary boycotts.<sup>110</sup> Some countries, however, view the *Helms-Burton Act* of 1996 as a secondary boycott.<sup>111</sup> The Act gives standing for Cuban Americans who obtained U.S. citizenship after the expropriation occurred.<sup>112</sup> The Act also prohibits granting visas to any alien who has confiscated or trafficked property claimed to be owned by a U.S. national, or 'is a corporate

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<sup>101</sup> Restatement (Fourth) § 201, Reporters' Note 8.

<sup>102</sup> 18 USC § 2332 (2012).

<sup>103</sup> 18 USC § 2332(D) (2012).

<sup>104</sup> See 18 USC § 2333 (2012) (making liability contingent on the victim being of American nationality).

<sup>105</sup> See 28 USC § 1605A(c) (2012) (making liability contingent on the victim being of American nationality).

<sup>106</sup> See text accompanying n 13–14.

<sup>107</sup> See n text accompanying n 99–100.

<sup>108</sup> *ibid*; Restatement (Fourth) § 201, cmt. g (stating "With respect to corporations and other juridical persons, U.S. statutes typically exercise active-personality jurisdiction based on the juridical person's organization under U.S. law, principal place of business within the United States, or both."). See also *ibid* Reporters's Note 7 (collecting statutes basing jurisdiction on these criteria and noting other statutes that base jurisdiction on corporations on the ground that they are owned or controlled by U.S. nationals).

<sup>109</sup> 22 USC § 6082 (2012).

<sup>110</sup> Mark A Groombridge, 'Missing the Target: The Failure of the Helms-Burton Act' (2011) Center for Trade Policy Studies 4–5.

<sup>111</sup> *ibid*.

<sup>112</sup> *ibid*.

officer, principal, or shareholder with a controlling interest of an entity which has been involved' in confiscating or trafficking property claimed to be owned by a U.S. national.<sup>113</sup>

Under the *Helms-Burton Act*, the president has the ability to suspend the federal remedy under 22 U.S.C. § 6082,<sup>114</sup> and every president has chosen to keep the remedy dormant. In addition, the judicially-created act of state doctrine provides that the courts should not 'inquir[e] into the validity of the public acts a recognized foreign sovereign power committed within its own territory.'<sup>115</sup> Although Congress provided that the act of state doctrine should not apply to the *Helms-Burton Act*,<sup>116</sup> courts continue to apply the doctrine because the private remedy has remained dormant through presidential action.<sup>117</sup> For example, in *Glen v. Club Mediterranee, S.A.*, the defendant successfully used the act of state doctrine as a defense to a claim brought by U.S. citizens that the defendant had operated a hotel on land that had been seized by the Cuban government.<sup>118</sup>

### 2.5.7 *Protective principle: generally*

The United States has exercised jurisdiction over conduct outside its territory, by persons not is nationals or residents, that is 'directed against the security of the United States or against a limited class of other fundamental U.S. interests.'<sup>119</sup>

Offenses based on this protective principle of jurisdiction include counterfeiting, espionage, the murder of U.S. government officials,<sup>120</sup> and Congress has also relied on the protective principle to criminalize terrorism and narcotics trafficking.<sup>121</sup>

### 2.5.8 *Protective principle: national security, terrorism, and drugs*

Since the 1980s extraterritorial prosecutions have increased and become more focused 'on national security matters and narcotics crimes.'<sup>122</sup> As one commentator stated:

. . . There is, now, a steady drumbeat of extraterritorial prosecutions -- targeting terror leaders, global arms traffickers, and violent drug lords. The stakes of these prosecutions are like nothing else in the criminal law. Extraterritorial prosecutions have, for example, culminated in the convictions of multiple terror operatives for their roles in killing 224 people on a single day in East Africa. And in the context of extraterritorial narcotics prosecutions, defendants have been convicted for

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<sup>113</sup> 22 USC § 6091 (2012).

<sup>114</sup> 22 USC § 6085 (2012).

<sup>115</sup> *Glen v. Club Mediterranee, SA*, 450 F3d 1251, 1253 (11th Cir 2006) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 US 398, 401 (1964)).

<sup>116</sup> 22 USC § 6082(a)(1) (2012).

<sup>117</sup> See *Glen*, 450 F3d at 1256 (noting that Presidents Clinton and Bush suspended the right to a cause of action under the *Helms-Burton Act*).

<sup>118</sup> *ibid* at 1257.

<sup>119</sup> Restatement (Fourth) § 201(e).

<sup>120</sup> *ibid* cmt. i.

<sup>121</sup> *ibid* Reporters' Note 9 (collecting statutes).

<sup>122</sup> Michael Farbiarz, 'Extraterritorial Criminal Jurisdiction' (2016) 114 Mich L Rev 507, 512.

selling staggering volumes of cocaine, as well as surface-to-air missiles for shooting down aircraft.

But it is not just the moral temperature of extraterritorial prosecutions that sets them apart. It is also that such prosecutions are tools of U.S. national security policy, devices used to project American power abroad.<sup>123</sup>

Some of these prosecutions, particularly attacks on U.S. troops or nationals, might also be regarded as examples of the protective principle. Alternatively, as noted below, terrorism may be subject to universal jurisdiction.

#### 2.5.9 *Universal jurisdiction: generally*

The United States has exercised jurisdiction to prescribe ‘offenses of universal concern, such as piracy, slavery, forced labor, trafficking in persons, recruitment of child soldiers, torture, extrajudicial killing, genocide, and certain acts of terrorism, even if no specific connection exists between the United States and the persons or conduct being regulated.’<sup>124</sup> The lower federal courts are divided on the question whether terrorism-related offenses are subject to universal jurisdiction.<sup>125</sup>

Although Congress has enacted several statutes in the past decade that provide for universal jurisdiction, it has not exercised universal jurisdiction to the full extent permitted by customary international law. For example, there is no federal statute proscribing crimes against humanity.<sup>126</sup> As a result, there remains what one commentator called ‘a glaring lacuna in the universal jurisdiction statutory scheme that fails to account for some of the most serious human rights violations.’<sup>127</sup>

#### 2.5.10 *Universal jurisdiction over absent defendants*

Because the United States requires that the defendant be present at the commencement of the trial,<sup>128</sup> a prosecution could not go forward unless the alleged offender was present in the United States or could be extradited to stand trial in the United States.<sup>129</sup>

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<sup>123</sup> *ibid* 512 (footnotes omitted).

<sup>124</sup> Restatement (Fourth) §201(1)(f). For a listing of the offenses, see *ibid* Reporters’ Note 10. See also *Sosa v Alvarez-Machain*, 542 US 692, 761–63 (2004) (Breyer, J concurring) (stating that United States recognizes universal jurisdiction for a very small number of cases, such as piracy, slave trading, genocide, war crimes, crimes against humanity, and torture).

<sup>125</sup> Restatement (Fourth) § 201, Reporters’ Note 9, 17 (collecting cases).

<sup>126</sup> *ibid* §201, Reporters’ Note 10. A Crimes Against Humanity Act was introduced in 2010, although ultimately was not enacted. Congress has enacted a war crimes statute, although it only applies when either the victim or perpetrator is a member of the U.S. army or is a U.S. national. *ibid*.

<sup>127</sup> Jonah Diamond, ‘International Accountability in U.S. Law: A Call for Legislation’ (2016) 14 *Cardozo Pub L Pol’y & Ethics J* 623, 626.

<sup>128</sup> See Fed R Crim P 43(a) & (c) (requiring presence of defendant in felony prosecutions at initial appearance, initial arraignment, the plea, and “every trial stage,” but allowing waiver of that right if a defendant who is initially present is “voluntarily absent after the trial has begun”).

<sup>129</sup> *Cf Restatement (Fourth) § 201, Reporters’ Note 10* (explaining that because the United States does not permit trials in absentia, certain criminal statutes requiring that the defendant be “present in” or “found in” the United States rest upon universal rather than territorial jurisdiction).

### 2.5.11 Universal jurisdiction over corporations

Corporations have not been prosecuted for offenses under universal jurisdiction.

## 2.6 Vicarious Jurisdiction – Stellvertretende Strafrechtspflege

The United States does not recognize the European theory of vicarious jurisdiction.<sup>130</sup> Such jurisdiction is recognized by the European Convention on the Transfer of Proceedings in Criminal Matters.<sup>131</sup> The Convention allows signatories to request another signatory prosecute the requesting country's residents and citizens.<sup>132</sup> These requested prosecutions are subject to certain conditions.<sup>133</sup>

Most U.S. criminal justice officials see such prosecutions as contrary to U.S. legal norms and unnecessary given the possibility of extradition.<sup>134</sup> This tension, between the European preference for vicarious jurisdiction and the U.S. preference for extradition, may allow some accused criminals to escape prosecution.<sup>135</sup> Because of political and bureaucratic incentives, law enforcement prioritizes domestic prosecutions over vicarious prosecutions of non-nationals accused of criminal activity elsewhere, and countries denied extradition of an accused criminal lose interest in such cases.<sup>136</sup> The U.S. generally also refuses to extradite persons to countries, which do not grant its extradition requests.<sup>137</sup> Modern extradition treaties address this gap by both increasing the number of offenses for which parties must expedite and guaranteeing vicarious prosecution of any individuals that a signatory refuses to extradite.<sup>138</sup>

The United States does recognize a unique theory of what it calls vicarious jurisdiction, although its use has been somewhat limited by a recent Supreme Court decision. This version of vicarious jurisdiction allows jurisdiction over a subsidiary to establish jurisdiction over a parent corporation.<sup>139</sup> This form of vicarious jurisdiction is more common under

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<sup>130</sup> Ethan A. Nadelmann, 'The Role of the United States in the International Enforcement of Criminal Law' (1990) 31 Harv Int'l L J 37, 75.

<sup>131</sup> Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-party States' (2001) 64-Winter Law & Contemp Probs 13, 44.

<sup>132</sup> The European Convention on the Transfer of Proceedings in Criminal Matters, Mar. 30, 1978, ETS No 73.

<sup>133</sup> States may undertake prosecutions on behalf of another country, so long as the act was criminal in both the country requesting and the country undertaking the prosecution. The penalty imposed may not be greater than the penalty available in the requesting country. Once such a request has been made, the requesting country may no longer prosecute the suspect for the offense, and vacates any judgments already issued against the suspect. *ibid.* Not all European countries are signatories to the Convention. For example, Germany recognizes and practices vicarious jurisdiction, albeit subject to different conditions. Jurgen Meyer, 'The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction' (1990) 31 Harv Int'l L J 108, 115–16. Other non-signatories may exercise such jurisdiction as well.

<sup>134</sup> Nadelmann (n 130) 75.

<sup>135</sup> *ibid* 69.

<sup>136</sup> *ibid* 70.

<sup>137</sup> *ibid* 69.

<sup>138</sup> *ibid* 65–66.

<sup>139</sup> Keri M Martin, 'What Remains of Vicarious Jurisdiction for Establishing Jurisdiction Over Corporate Defendants After *Daimler AG v Bauman*?' (2015) 12 Seton Hall Circ Rev 1, 2.

courts' specific jurisdiction, where jurisdiction is based on actions in the forum state that gave rise to the claim.<sup>140</sup> After determining that the subsidiary's contacts are sufficient for specific jurisdiction, the court can impute those contacts to the parent corporation under an agency theory.<sup>141</sup>

Vicarious jurisdiction can also be exercised under courts' general jurisdiction, but there is a higher bar. In order to establish vicarious jurisdiction through general jurisdiction, a court must undertake a three-step analysis. The court first determines whether the subsidiary is 'at home' in the forum jurisdiction and, thus, subject to the court's general jurisdiction. If the subsidiary is at home in the jurisdiction, the second step is to determine whether the subsidiary's contacts in the forum state can be imputed to the parent under substantive law, such as under an agency or alter ego theory. Finally, if the subsidiary's contacts can be imputed to the parent, the court then determines if the parent, with the imputed contacts, is 'at home' in the forum state.<sup>142</sup> To avoid concerns that corporations might be subject to jurisdiction in every state, at the third step of analysis the court can examine the corporation's forum contacts in the context of its entire activities.<sup>143</sup> In *Daimler AG v. Bauman*, the Supreme Court assumed that the subsidiary was at home in the forum state and that the subsidiary's contacts could be imputed to the parent.<sup>144</sup> But the Court declined to extend personal jurisdiction over the parent because 'the same global reach would presumably be available in every other State in which [the subsidiary's] sales are sizable.'<sup>145</sup>

## 2.7 Other sources of jurisdiction; limiting jurisdiction

The U.S. recognizes only the traditional grounds for the exercise of prescriptive jurisdiction: territorial jurisdiction, jurisdiction based on effects in the United States, jurisdiction based on active and passive personality, jurisdiction based on nationality, and some forms of universal jurisdiction.<sup>146</sup>

Unlike some other nations, the United States has not established other creative grounds for jurisdiction to hold corporations liable. To the contrary, in recent decades, the courts have effectively restricted the scope of civil jurisdiction over corporate (as well as individual) conduct outside the United States. One decision emphasized that courts should presume that U.S. statutes are not intended to apply to extraterritorial conduct.<sup>147</sup> Another ruling extended this presumption to statutes providing for jurisdiction, as well as those defining offenses or civil causes of action.<sup>148</sup> As noted, the courts also stressed the need to consider prescriptive comity to avoid creating friction with the laws of other nations.<sup>149</sup>

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<sup>140</sup> *ibid* 7.

<sup>141</sup> Lonny Sheinkopf Hoffman, 'The Case Against Vicarious Jurisdiction' (2004) 152 U Pa L Rev 1023, 1027.

<sup>142</sup> Martin (n 139) 14–15.

<sup>143</sup> 'Civil Procedure: Daimler AG v Bauman' (2014) 128 Harv L Rev 311, 318–319.

<sup>144</sup> *Daimler AG v Bauman*, 134 S Ct 746, 760 (2014).

<sup>145</sup> *ibid* 761–62.

<sup>146</sup> See text accompanying n 68–127.

<sup>147</sup> *Morrison v Nat Australia Bank Ltd*, 561 US 247, 255, 261 (2010).

<sup>148</sup> *Daimler AG v Bauman*, 134 S Ct 746, 761–62 (2014).

<sup>149</sup> *Kiobel v Royal Dutch Petroleum*, 133 S Ct 1659, 1665 (2013).

## 2.8 Special justice mechanisms

The United States does not have any significant national rules regarding extraterritorial jurisdiction for special justice mechanisms, such as truth and reconciliation commissions or local justice.

### 3 Determining whether U.S. statutes grant extraterritorial jurisdiction

Although the U.S. recognizes prescriptive extraterritorial jurisdiction based upon nationality, active and passive personality, the protective principle, and universal jurisdiction,<sup>150</sup> the question whether a particular crime will have extraterritorial application must be determined by the courts. To a significant degree, U.S. courts' approach to territoriality is shaped by the statutory provision in question. Some U.S. statutes explicitly refer to conduct that occurs in whole or part within the United States.<sup>151</sup> Others, however, that do not specifically address the issue have been construed to apply only to conduct that occurs in the United States.<sup>152</sup>

Over the last fifteen years the Supreme Court has tightened the rules of statutory interpretation and significantly restricted access to the federal courts in cases involving extraterritorial conduct. Other limiting doctrines have also been applied in the lower federal courts.

#### 3.1 The presumption against extraterritorial effect

In a series of decisions, the United States Supreme Court has emphasized that courts construing federal statutes should apply a strong presumption against extraterritorial effect.<sup>153</sup> In two major cases, *Kiobel* and *Morrison*,<sup>154</sup> the Court interpreted narrowly key statutes relied upon by civil plaintiffs to bring cases based on extraterritorial conduct. These cases instructed the federal courts to apply a presumption against extraterritoriality: absent a clearly expressed Congressional intent to the contrary, federal laws will be construed to have only domestic application.<sup>155</sup> In justifying this presumption, the Court emphasized the need to avoid international discord<sup>156</sup> or friction, as well as the 'common sense' view that Congress ordinarily focuses on domestic matters.<sup>157</sup> Although the courts had previously applied such a presumption, they did so unevenly and with little across-the-board rigor.<sup>158</sup>

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<sup>150</sup> See text accompanying n 68-127.

<sup>151</sup> Restatement (Fourth), § 201, Reporters' Note 5 (collecting statutes).

<sup>152</sup> *ibid.*

<sup>153</sup> Many earlier cases had also recognized this presumption, but its application had been uneven and courts more frequently found that legislation applied extraterritorially. See *Restatement (Fourth)*, § 203, Reporters' Note 1.

<sup>154</sup> *Kiobel v Royal Dutch Petroleum*, 133 S Ct 1659, 1669 (2013); *Morrison v Nat Australia Bank Ltd*, 561 US 247, 255, 261 (2010).

<sup>155</sup> *Kiobel*, 133 S Ct at 1665; *Morrison* 561 US at 261.

<sup>156</sup> *Kiobel*, 133 S Ct at 1665.

<sup>157</sup> *Morrison*, 561 US at 255.

<sup>158</sup> See *Restatement (Fourth)*, § 203, Reporters' Note 1 (describing the evolution of the presumption).

The decisions had a dramatic effect: by one count, within the first two years after the decision in *Kiobel*, lower courts dismissed nearly 70 percent of the cases brought under a key statute used by plaintiffs seeking relief for human rights violations.<sup>159</sup>

It is unclear whether this presumption is applicable to all federal crimes. In criminal cases, the federal courts had applied a somewhat more liberal rule of construction to the question of extraterritorial jurisdiction,<sup>160</sup> but it is doubtful whether the earlier cases are still good law. In *United States v. Bowman*, a decision from 1922, the Supreme Court indicated that some offenses are not subject to the presumption against extraterritorial application. The Court recognized that crimes ‘affect[ing] the peace and good order of the community,’ such as murder, robbery, and arson, are presumed to be territorial.<sup>161</sup> But the Court stated other crimes that are ‘not logically dependent on their locality for the government’s jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated,’ are not presumed to be territorial.<sup>162</sup> In the intervening decades, *Bowman* was followed by the lower courts, which found that a variety of offenses not logically dependent on their locality have extraterritorial application.<sup>163</sup>

A recent case involving a civil suit brought under the *Racketeering and Corrupt Organization (RICO) Act*<sup>164</sup> cast serious doubt on the Supreme Court’s continued adherence to *Bowman*. The Court first considered the question whether the criminal provisions of *RICO* itself, and various federal crimes that are *RICO* predicate offenses, have extraterritorial effect.<sup>165</sup> The Court drew no distinction between civil and criminal statutes. In determining the reach of these offenses, the Court applied the presumption against extraterritorial effect, citing its prior decisions in civil cases.<sup>166</sup> It did not discuss or even cite the *Bowman* decision.

In light of the Supreme Court’s failure to apply or even consider *Bowman*, it appears that going forward U.S. courts will apply the same general presumption against extraterritorial

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<sup>159</sup> Institute for Legal Reform, U.S. Chamber of Commerce, ‘As *Kiobel* Turns Two: How the Supreme Court is Leaving the Details to the Lower Courts’ 4 (Aug. 2015) (referring to claims based on the Alien Tort Statute, discussed in the text accompanying n 209-22).

<sup>160</sup> See S Nathan Williams, ‘Note, The Sometimes “Craven Watchdog”: The Disparate Criminal-Civil Application of the Presumption Against Extraterritoriality’ (2014) 63 Duke LJ 1381, 1383–84 (describing the civil and criminal lines of cases and arguing that they should be reconciled); Charles Doyle, ‘Extraterritorial Application of American Criminal Law’ (2016) Cong Research Serv, 9–10 (describing “second rule of construction” originating in the Supreme Court’s decision in *United States v Bowman*, 260 US 94 (1922)), 19–20 (noting that lower courts understood *Bowman* to mean “a substantial number of . . . crimes operate overseas by virtue of the implicit intent of Congress”).

<sup>161</sup> *United States v Bowman*, 260 US 94, 98 (1922).

<sup>162</sup> *ibid.*

<sup>163</sup> Williams (n 160) 1395 (“[C]ourts have found that some crimes are so inherently transnational as to deserve the blessing of the *Bowman* exception. Typical crimes in this . . . category include trafficking (human or drug) and racketeering.”).

<sup>164</sup> *RJR Nabisco v European Cmty*, 136 S Ct 2090 (2016).

<sup>165</sup> *ibid* 2099–06.

<sup>166</sup> *ibid* 2100–01.

application to both civil and criminal statutes.<sup>167</sup> It is less certain, however, whether this shift of emphasis will affect the construction of statutes previously found to have extraterritorial effect.

## 3.2 Other Limiting Interpretative Principles

Other interpretative principles may also lead the courts to give criminal legislation only domestic application.

### 3.2.1 *Prescriptive comity*

In exercising jurisdiction to prescribe, the United States considers other states' legitimate interests as a matter of prescriptive comity.<sup>168</sup> In interpreting the scope of federal statutes, the federal courts seek to avoid interference with the legitimate sovereign authority of other states.<sup>169</sup> Consideration of prescriptive comity helps the potentially different laws of various nations work together in harmony.<sup>170</sup>

The Third Restatement of Foreign Relations Law of the United States set forth factors to be considered when determining if jurisdiction to prescribe is 'unreasonable.' These elements include such considerations as the 'link of the activity to the territory,' the relationship between potential defendants and the prosecuting state, the 'desirability of such regulation,' expectations, global significance of prosecution, traditions of the international system, and the 'likelihood of conflict with regulation by another state.'<sup>171</sup>

In contrast, the Fourth Restatement does not carry forward this list of factors, and it does not define when the exercise of jurisdiction would be unreasonable. Instead, the draft treats 'reasonableness' as one factor to be considered as part of statutory interpretation. The Council draft states that as 'a matter of prescriptive comity, U.S. courts may interpret federal statutory provisions' to include limitations on their applicability other than a presumption against extraterritorial application.<sup>172</sup> The comments explain that this view is drawn from the decisions of the Supreme Court describing reasonableness as a principle of prescriptive comity.<sup>173</sup> Prescriptive comity does not avoid all interference with the sovereign authority of other states, because interference may be reasonable if the application of U.S. law would 'serve the legitimate interests of the United States.'<sup>174</sup>

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<sup>167</sup> See *Restatement (Fourth)* § 203 Reporters' note 4 ("U.S. practice with respect to jurisdiction to prescribe generally does not distinguish between public and private law or between civil and criminal enforcement.").

<sup>168</sup> *ibid* § 201(2).

<sup>169</sup> *Id.* §204.

<sup>170</sup> *F. Hoffmann-LaRoche Ltd. V. Empagran S.A.*, 542 U.S. 155 (2004), quoted in *Restatement (Fourth)* § 204, Reporters' Note 1.

<sup>171</sup> *Restatement (Third)* § 403(2)(a-h).

<sup>172</sup> *Restatement (Fourth)* § 204.

<sup>173</sup> *ibid* cmt a (quoting *F Hoffman-La Roche Ltd v Empagran SA*, 542 US 155, 165 (2004)).

<sup>174</sup> *ibid* cmt b.

As applied by the Supreme Court, reasonableness as a matter of prescriptive comity works with – rather than superseding – other elements of statutory construction, including an examination of statutory text, legislative history, and relevant policy considerations.<sup>175</sup>

### 3.2.2 *Due Process*

In 2014, the Supreme Court interpreted the Due Process clause to severely constrain general jurisdiction over corporate defendants (that is, jurisdiction for a claim not based on the defendant's contacts with the U.S. forum) in civil cases.<sup>176</sup> It held that an American court may not exercise jurisdiction over a foreign corporation in a civil case based on the fact that its subsidiary conducted significant business in the United States.<sup>177</sup> A U.S. court may only assert general jurisdiction over out-of-state corporations where 'their affiliations with the [forum] State are so 'continuous and systematic' as to render them essentially at home' in that state.<sup>178</sup> The Court rejected the argument that general jurisdiction obtains in any state in which a corporation 'engages in a substantial, continuous, and systematic course of business.'<sup>179</sup> The doing business standard would extend jurisdiction too broadly, the Court said, making it difficult for out-of-state corporations to predict where they might be subject to suit. In contrast, the place of incorporation and a corporation's principal place of business are the 'paradigm' places where a corporation can be 'fairly regarded' as at home; they are 'unique ... as well as easily ascertainable[,] ... afford[ing] plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.'<sup>180</sup> The Court also cited the need to avoid international discord.<sup>181</sup> Many commentators were critical of the decision, characterizing it as part of a trend towards restricting access to the courts, 'unduly straitening general jurisdiction to the disadvantage of plaintiffs.'<sup>182</sup>

Historically concern for the defendant's interests has played a more significant role in the analysis of civil jurisdiction than criminal jurisdiction, but recent developments have brought the approach in civil and criminal cases closer together. In civil cases, Due Process concerns have traditionally shaped the contours of both personal jurisdiction over individual defendants and prescriptive jurisdiction; the courts have required consideration of the nexus between the defendant and both the jurisdiction in which the case is brought and the state law to be applied.<sup>183</sup> Thus in civil cases involving claims of extraterritorial

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<sup>175</sup> See *F Hoffmann-LaRoche*, 542 US at 169–75 (2004) (combining prescriptive comity with other methods of statutory construction).

<sup>176</sup> *Daimler AG v Bauman*, 134 S Ct 751 (2014).

<sup>177</sup> *ibid* 759–60

<sup>178</sup> *ibid* 751, quoting *Goodyear Dunlop Tires Operations, S.A. v Brown*, 131 S Ct 2846, 2851 (2011).

<sup>179</sup> *ibid* 761.

<sup>180</sup> *ibid* 760.

<sup>181</sup> See *ibid* 762 (discussing the lower court's failure to consider international comity).

<sup>182</sup> 'Personal Jurisdiction—General Jurisdiction—*Daimler AG v Bauman*' (2014) 128 Harv L Rev 311, 316 & n. 62.

<sup>183</sup> See generally *Restatement (Fourth) of the Law of Foreign Relations* § 202 cmt. c (Due Process clause of the Fourteenth Amendment limits prescriptive jurisdiction of U.S. courts, requiring sufficient contacts creating state interest such that choice of law is not arbitrary or unfair); *id.*, § 302(1) (stating Due Process clause requires sufficient contacts with the forum for the exercise of personal jurisdiction to be reasonable). See also Farbiarz, (n 122) 514–15 (comparing due process analysis in civil and criminal cases).

jurisdiction, the courts are cognizant of the interests of defendants as well as concerns regarding international relations.<sup>184</sup> In contrast, the analysis in criminal cases has not, traditionally, focused on this nexus. In criminal cases when a valid federal statute clearly provides for extraterritorial jurisdiction and the defendant has been brought before the court, the Supreme Court has never considered the question whether there are Due Process limitations on extraterritorial jurisdiction.<sup>185</sup>

There is, however, now a body of influential case law in the lower federal courts developing an extraterritorial due process doctrine in criminal cases, which requires a sufficient nexus between the defendant and the U.S. so that application of U.S. law is not unfair.<sup>186</sup> Although only one criminal case has been dismissed for failure to satisfy this extraterritorial due process doctrine, the doctrine may be influencing prosecutors' decisions about whether to bring extraterritorial charges.<sup>187</sup> If that is the case, it may affect corporate as well as individual prosecutions.

### 3.2.3 *Avoiding conflicts with international law*

The federal courts apply the *Charming Betsy* principle, which states that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'<sup>188</sup> This principle is applied, however, only when a construction avoiding such a conflict is 'fairly possible.'<sup>189</sup> When such a construction is not fairly possible, 'the federal statute is controlling as a matter of law.'<sup>190</sup> And the Supreme Court twice invoked the canon of 'constru[ing] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.'<sup>191</sup>

### 3.2.4 *Avoiding conflicts with the authority of U.S. states*

Another canon of construction that may lead to the narrow construction of a federal statute is a presumption against interpreting federal law in a manner that may intrude into areas that are traditionally the province of state law.<sup>192</sup>

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<sup>184</sup> See generally *Daimler AG v Bauman*, 134 S Ct 746 (2014) (finding no general jurisdiction over corporate parent that was not "at home" in California).

<sup>185</sup> See *Restatement (Fourth)* § 202, Reporters' note 5 (stating that Supreme Court has not "addressed in modern times whether the same test governs the application of federal law under the Fifth Amendment," and citing some lower court decisions requiring a sufficient nexus between the defendant and the U.S. so that application of U.S. law is not unfair).

<sup>186</sup> See *Farbiarz* (n 122) 516-17 (describing the developments in the circuits), and *Doyle* (n 159) at 5-10.

<sup>187</sup> See *Farbiarz*, *supra* (n 122) 517 (noting that although courts have dismissed only one extraterritorial prosecution on due process grounds the doctrine still may be doing "important work" by influencing prosecutorial discretion).

<sup>188</sup> *Murray v The Schooner Charming Betsy*, 6 US 64, 118 (1804).

<sup>189</sup> *Restatement (Fourth)* § 205. Accord *Restatement (Third)* § 114.

<sup>190</sup> *ibid.*

<sup>191</sup> *F Hoffman-La Roche Ltd v Empagran SA*, 542 US 155, 164 (2004). This canon has not, however, been invoked by the Court since its 2007 holding in *Microsoft Corp v AT&T Corp*, 550 US 437, 455 (2007).

<sup>192</sup> *Bond v United States*, 134 S Ct. 2077 (2014).

## 4 Extraterritorial jurisdiction over human rights offenses

### 4.1 Jurisdiction over human rights offenses defined by international treaty or customary international law

U.S. jurisdiction to prosecute corporate defendants cannot be based solely on an international treaty or customary international law. Rather, corporate (and individual) defendants may be prosecuted only when there is an applicable federal criminal statute.<sup>193</sup>

#### 4.1.1 Jurisdiction over offenses defined by treaties

The United States may only prosecute core and treaty crimes if Congress has passed the necessary domestic legislation to implement international commitments.

Two forms of Congressional action are relevant. Although the U.S. Constitution delegates the power to sign treaties to the President, Article II provides the first step, requiring the president to obtain the advice and consent of two-thirds of the Senate to make treaty commitments.<sup>194</sup> The Supreme Court has distinguished self-executing treaties from those that require additional legislative action – a second step – by Congress.<sup>195</sup> Unlike self-executing treaties, which becomes part of domestic law once they have been approved by the Senate, non-self-executing treaties require further legislation before they become effective. These procedural requirements determine which international treaties become part of U.S. law. For example, *President Bill Clinton* signed the *Rome Statute* establishing the *International Criminal Court* ('ICC') in 2000, but the Senate never approved the treaty. Accordingly, the United States does not participate in the ICC. Thus international conventions that create treaty or core crimes to be prosecuted by the United States must first become domestic law. In other words, a core or treaty crime may not be prosecuted unless Congress has enacted a corresponding criminal statute.

The United States is a signatory to hundreds of international agreements that may include commitments to criminalize certain acts.<sup>196</sup> Although the United States is not a signatory to the Rome Statute establishing the ICC, many treaties address the “core crimes” that concern

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<sup>193</sup> See text accompanying n 66-67.

<sup>194</sup> For a discussion of this process, see Curtis A Bradley, 'Unratified Treaties, Domestic Politics, and the U.S. Constitution' (2007) 48 Harv Int'l LJ 307, 310, 319–21 (noting that on many occasions presidents have not submitted signed treaties to the Senate and in a few cases the Senate has refused to approve treaties that have been presented). Some international agreements may not be subject to the Article II process. *ibid* (describing “executive agreements” and “congressional-executive agreements”).

<sup>195</sup> See *Foster v Neilson*, 27 US (2 Pet) 253, 254 (1829) (“In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”), *overruled on other grounds by* *United States v Percheman*, 32 US (6 Pet) 51 (1833).

<sup>196</sup> See generally US Dep't of State, 'Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2013' (2013) <<https://www.state.gov/documents/organization/267489.pdf>> accessed 10 August 2016.

the ICC.<sup>197</sup> Based on the State Department's reporting of Treaties in Force, the U.S. has ratified treaties covering other topics that may require or allow states to exercise extraterritorial jurisdiction, such as bribery, children's rights, corruption, drugs, financial institutions, genocide, human rights, ocean dumping, oil pollution, slavery, and human trafficking<sup>198</sup>

The *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act* of 2003 (the '*PROTECT Act*'),<sup>199</sup> illustrates the constitutional and human rights framework in which treaty crimes may be prosecuted in the United States. It provides, in pertinent part, that '[a]ny United States citizen or alien admitted for permanent residence who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person' is guilty of a felony and subject to imprisonment for up to 30 years.<sup>200</sup> The *PROTECT Act* was passed following two international commitments that the United States made to prosecuting sex crimes against children, particularly in extraterritorial settings. The United States had already ratified the United Nation's Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography<sup>201</sup> in 2002 and had also signed the *Yokohama Global Commitment*,<sup>202</sup> which advocated for greater protection of children against sexual exploitation, in 2001. The *PROTECT Act* was reportedly first enforced in 2003 against an American who had been caught engaged in commercial sexual activity with minors in *Cambodia*.<sup>203</sup>

Where an existing statute arguably provides for extraterritorial jurisdiction over a corporate (or individual) defendant, the question is one of statutory interpretation. As noted above,<sup>204</sup>

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<sup>197</sup> See generally US Dep't of State, 'Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2013' (2013) <<http://www.state.gov/s/l/treaty/tif/>> accessed 10 August 2016.

<sup>198</sup> See *ibid* iii-iv

<sup>199</sup> Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT), Pub L No 108-21, 117 Stat 650 (codified in scattered sections of 18, 21, 28, and 42 of the US Code).

<sup>200</sup> 18 USC § 2423(c) (2012).

<sup>201</sup> The United Nations Office of the High Commissioner, 'Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>> accessed 10 August 2016 ("1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis: (a) In the context of sale of children as defined in article 2: (i) Offering, delivering or accepting, by whatever means, a child for the purpose of: a. Sexual exploitation of the child; b. Transfer of organs of the child for profit; c. Engagement of the child in forced labour; (ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption; (b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2; (c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.").

<sup>202</sup> UNICEF, 'The Yokohama Global Commitment' <<http://www.unicef.org/events/yokohama/outcome.html>> accessed 10 August 2016.

<sup>203</sup> 'Recent Case: United States v Clark, 435 F.3d 1100 (9th Cir. 2006)' (2006) 119 Harv L Rev 2612, 2612-13.

<sup>204</sup> See text accompanying n 150-66.

jurisdiction for offenses outside the United States is only possible when Congress has intended the offense in question to have extraterritorial effect, and there is a presumption against interpreting U.S. statutes to have extraterritorial effect. Other considerations may also play a role in the interpretation of statutes to determine whether they should be given extraterritorial effect.

#### 4.1.2 *Jurisdictions over offenses proscribed by international humanitarian law*

As noted, jurisdiction must be predicated on an act of Congress, and Congress has not exercised universal jurisdiction to the full extent permitted by customary international law.<sup>205</sup> There is no federal statute proscribing crimes against humanity.<sup>206</sup> As a result, there remains what one commenter called ‘a glaring lacuna in the universal jurisdiction statutory scheme that fails to account for some of the most serious human rights violations.’<sup>207</sup>

#### 4.1.3 *Jurisdiction over crimes based on customary international law*

Customary international law cannot, by itself, serve as the basis for federal criminal liability. Common law crimes are not recognized in the federal system,<sup>208</sup> and thus legislation is necessary to create a federal criminal offense. Congress has, however, enacted legislation that incorporates customary international law in one offense: it is a federal offense to commit ‘the crime of piracy, as defined by the law of nations’ on the high seas.<sup>209</sup>

#### 4.1.4 *Civil Jurisdiction based on customary international law: the Alien Tort Statute*

One statute – the *Alien Tort Statute (ATS)*<sup>210</sup> – has been interpreted to provide the federal courts with jurisdiction over civil actions based on customary international law, but in the past two decades the statute’s reach has been substantially narrowed by judicial decisions. The *ATS*, which was passed as part of the first Judiciary Act of 1789, gives the federal courts original jurisdiction over ‘any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’

Beginning with a landmark decision in 1980,<sup>211</sup> lower federal courts held that the *ATS* provided a private cause of action under international law. Human rights organizations and individual alien plaintiffs adopted the strategy of suing corporations (rather than foreign governments) under the *ATS*.<sup>212</sup> Plaintiffs saw the *ATS* as offering multiple advantages,

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<sup>205</sup> See text accompanying n 66-67, 124-29.

<sup>206</sup> *Restatement (Fourth)* §201, Reporters’ Note 10. A Crimes Against Humanity Act was introduced in 2010, although ultimately was not enacted. Congress has enacted a war crimes statute, although it only applies when either the victim or perpetrator is a member of the U.S. army or is a U.S. national. *ibid*.

<sup>207</sup> Jonah Diamond, ‘International Accountability in U.S. Law: A Call for Legislation’ (2016) 14 *Cardozo Pub L Pol’y & Ethics J* 623, 626.

<sup>208</sup> See text accompanying n 66-67.

<sup>209</sup> 18 USC § 1651.

<sup>210</sup> 28 USC § 1350 (2006). For the original version of the *ATS*, see Judiciary Act of 1789 § 9(b), 1 Stat. 77.

<sup>211</sup> *Filártiga v Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>212</sup> See Donald Earl Childress III, ‘The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation’ (2012) 100 *Geo L J* 709, 718-19 (describing the shift in litigation strategy and noting dramatic rise in *ATS* filings following suit against Unocal).

including a neutral forum and favorable substantive law, as well as ‘liberal pretrial discovery; ... jury trials in civil litigation; higher damage awards, including punitive damages; class action litigation; contingent fee arrangements with counsel; the absence of ‘loser pay’ rules for the unsuccessful party; and statutory protections for international law violations.’<sup>213</sup>

In response to the explosion of *ATS* litigation, the federal courts have cut back substantially on the effective reach of the *ATS*. The Supreme Court imposed two significant limitations. In *Sosa v. Alvarez-Machain*<sup>214</sup> the Court limited the *ATS* to a narrow range of well-established and specifically defined international law violations. And in *Kiobel v. Royal Dutch Petroleum*<sup>215</sup> the Court held that the presumption against extraterritorial application of statutes bars alien tort claims over conduct that does not ‘touch and concern the territory of the United States ... with sufficient force.’<sup>216</sup> Although lower courts have generally understood the *Kiobel* ruling to bar all suits based on tortious conduct that occurred solely overseas, one lower court allowed an *ATS* suit alleging torture by U.S. military contractors in Afghanistan to go forward.<sup>217</sup> The lower federal courts have also applied a variety of other doctrines to limit *ATS* suits, including prudential or judicially-created exhaustion remedies, forum non conveniens, and heightened pleading standards.<sup>218</sup>

The circuits split on the question whether corporations were subject to suit under the *ATS*, with one influential circuit holding that corporate liability has not been established as part of international law.<sup>219</sup> In April 2017, the Supreme Court granted certiorari to resolve the circuit split.<sup>220</sup>

The judicial decisions restricting the availability of the *ATS* reflect concerns about the judiciary’s institutional competence and the proper allocation of authority within the federal constitutional system. Influential scholars have argued that the judicial development of international law norms without the clear sanction of and direction from the political

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<sup>213</sup> *ibid* 723 (quoting Roger P. Alford, ‘Arbitrating Human Rights’ (2008) 83 *Notre Dame L Rev* 505, 508-09).

<sup>214</sup> 542 US 692 (2004). The Court agreed that the *ATS* provides a basis for jurisdiction but it found “no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *ibid* 724. Noting that “there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind,” it held that “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.” *ibid* 725.

<sup>215</sup> 133 S Ct 1659, 1669 (2013).

<sup>216</sup> *ibid* 1669.

<sup>217</sup> See ‘Foreign Relations Law—Alien Tort Statute—Fourth Circuit Allows Alien Tort Statute Claim Against Abu Ghraib Contractor to Go Forward’ (2015) 128 *Harv L Rev* 1534 (discussing *Al Shimari v CACI Premier Technology, Inc.*, 758 F3d 516 (4<sup>th</sup> Cir 2014)).

<sup>218</sup> *ibid* 728-30.

<sup>219</sup> *Kiobel v Royal Dutch Petroleum Co.*, 621 F.3d 111, 117, 145 (2d Cir. 2010), *aff’d* other *grnds*, 133 S Ct 1659, 1669 (2013).

<sup>220</sup> *Jesner v Arab Bank, PLC*, No. 16-499, cert. granted, No. 16-499 (April 3, 2017). Oral argument was heard October 11, 2017.

branches violates the constitutional principles of federalism and separation of powers.<sup>221</sup> One scholar summed up the current state of affairs:

there appears to be federal-court recognition that either Congress is unconcerned with activities occurring abroad absent clear statutory language expressing such a concern, or that courts are ill-equipped to adjudicate such cases even though they may have subject-matter and personal jurisdiction. These legal concerns dovetail with other public-policy concerns that courts may be taking [into] account . . . .<sup>222</sup>

#### 4.2 Reactions to prominent human rights cases, media coverage

The human rights community has expressed serious concerns about the lack of access to judicial remedies in light of these judicial decisions.<sup>223</sup> Despite the breadth of the doctrine of respondeat superior, the increasingly limited scope of extraterritorial U.S. jurisdiction may create areas of impunity for corporate conduct. As noted, the Supreme Court has emphasized that the courts should apply a presumption that federal statutes are not intended to have extraterritorial application.<sup>224</sup> Until recently the federal courts found the Congressional intent to give extraterritorial jurisdiction somewhat more readily in criminal than in civil cases,<sup>225</sup> but that distinction may no longer be viable. Additionally, as a matter of ‘prescriptive comity,’ U.S. courts may interpret statutes to include other limitations.<sup>226</sup> In particular, they may interpret a statute to avoid an unreasonable interference with the sovereign authority of other states.<sup>227</sup>

Decisions limiting American extraterritorial jurisdiction have drawn the attention of the mainstream media and generated some speculation and controversy.<sup>228</sup> Most of the coverage

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<sup>221</sup> For a description of the scholarly debate, see Childress (n 212) 719-21, and 726-27.

<sup>222</sup> *ibid* 736.

<sup>223</sup> *See, eg*, Gwynne L Skinner, ‘Beyond Kiobel: Providing Access to Remedies for Violation of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World’ (2014) 46 *Colum Hum Rts L Rev* 158.

<sup>224</sup> Restatement (Fourth) § 203.

<sup>225</sup> *See ibid* § 203 Reporters’ note 4 (asserting that “[u]less a contrary congressional intent appears, the geographic scope of a statute is the same for the purposes of both public and private enforcement,” noting that some courts relying on *Bowman* have concluded that the presumption of extraterritoriality does not apply to criminal cases, and reading *Bowman* more narrowly).

<sup>226</sup> *ibid* § 204 & cmts a & b.

<sup>227</sup> *See ibid* § 204 cmt c. (“application of the presumption [against extraterritoriality] does not preclude U.S. courts from interpreting a statute to include other comity limitations if doing so is consistent with the text, history, and purpose of the provision”).

<sup>228</sup> *See, eg*, Lauren Carasik, ‘Supreme Court Ruling Shields Corporations From Accountability’ *Aljazeera America* (20 February 2014) <<http://america.aljazeera.com/opinions/2014/2/supreme-court-daimlerbaumanhumanrightsargentina.html>> accessed 12 March 2017 (criticizing *Daimler*); Peter Henning, ‘RJR Nabisco Ruling Bolsters Justice Dept.’s Pursuit of FIFA’ *NY Times* (27 June 2016) <[https://www.nytimes.com/2016/06/28/business/dealbook/rjr-nabisco-ruling-bolsters-justice-depts-pursuit-of-fifa.html?\\_r=0](https://www.nytimes.com/2016/06/28/business/dealbook/rjr-nabisco-ruling-bolsters-justice-depts-pursuit-of-fifa.html?_r=0)> discussing the application of *RJR Nabisco* to applying RICO against FIFA corruption abroad; Eric Posner, ‘The United States Can’t Be the World’s Courthouse’ *Slate* (24 April 2013) <[http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2013/04/the\\_supreme\\_court\\_and\\_the\\_alien\\_tort\\_statute\\_ending\\_human\\_rights\\_suits.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/04/the_supreme_court_and_the_alien_tort_statute_ending_human_rights_suits.html)> (defending *Kiobel*); Sara Murphy, ‘Shell Wins; the

has focused on a few decisions of the Supreme Court<sup>229</sup> but there has also been some coverage of other cases in the lower courts.<sup>230</sup>

#### 4.3 The Trafficking Victim Protection Act: An example of the explicit assertion of extraterritorial jurisdiction

In 2000, Congress enacted the *Trafficking Victims Protection Act* ('TVPA')<sup>231</sup> 'combat trafficking in persons.'<sup>232</sup> The TVPA criminalizes both sex trafficking and labor trafficking, and it now reaches not only those who themselves traffic in persons, but also anyone who 'knowingly benefit[ted], financially or by receiving anything of value, from participation in a venture' complicit in human trafficking.<sup>233</sup> Courts have read this language broadly enough to uphold the conviction of someone who knew he was purchasing a service from forced laborers.<sup>234</sup>

In 2008 Congress added extraterritorial jurisdiction to the TVPA over (1) U.S. citizens and nationals acting abroad and (2) offenders 'present in the United States irrespective of the nationality of the alleged offender.'<sup>235</sup> In light of the decisions mentioned above, the TVPA might allow the United States to prosecute U.S. corporations for labor trafficking violations in foreign countries. However, the United States brought only 208 human trafficking cases in 2014, and corporate conduct abroad does not appear to be an enforcement priority.

The TVPA also includes a civil provision.<sup>236</sup> This cause of action has been successfully enforced against corporations. In one such case, Filipino teachers sued the recruiting agency that placed them in the United State for charging them a large, non-refundable recruitment fee before alerting them to the remaining, necessary fees.<sup>237</sup> The presiding court held that a violation of the TVPA was established where 'a defendant's misconduct has created a

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World Loses' *The Motley Fool* (17 April 2013) <<https://www.fool.com/investing/general/2013/04/17/shell-wins-the-world-loses.aspx>> (criticizing *Kiobel*).

<sup>229</sup> See Carasik (n 228) (analyzing *Daimler*); Henning (n 228) (discussing *RJR Nabisco*).

<sup>230</sup> For instance, the efforts of lawyer Terry Collingsworth to use the Alien Torts Statute to attack human rights violations abroad have garnered media attention. See Matt Kennard, 'Chiquita Made a Killing From Colombia's Civil War' *Pulitzer Center on Reporting* (27 January 2017) <<http://pulitzercenter.org/reporting/chiquita-made-killing-colombia%E2%80%99s-civil-war-will-their-victims-finally-see-justice>> accessed 12 March 2017; Joe Sandler Clarke, 'Terry Collingsworth: The Globe-Trotting Human Rights Lawyer Taking on Nestlé and ExxonMobil' *The Guardian* (2 September 2015) <<https://www.theguardian.com/global-development-professionals-network/2015/sep/02/terry-collingsworth-the-david-taking-on-the-corporate-goliaths>> 12 March 2017. See also Edvard Pettersson, 'Child Slavery Claims Against Nestle, Cargill Get One More Chance' *Bloomberg* (9 January 2017) <<https://www.bloomberg.com/news/articles/2017-01-09/child-slavery-claims-against-nestle-cargill-get-one-more-chance>> accessed 12 March 2017 (describing suit claiming Nestle and Cargill employees knew plaintiffs were forced into slavery as boys to harvest cocoa pods in Ivory Coast to produce chocolate that corporate advocates say could open the door to a flood of new cases).

<sup>231</sup> 22 USC § 7101 (2012).

<sup>232</sup> 22 USC § 7101.

<sup>233</sup> 18 USC § 1591 (2012).

<sup>234</sup> See *United States v Jungers*, 702 F.3d 1066, 1074 (8th Cir. 2013) (holding that "[a]pplying § 1591 to purchasers of commercial sex acts . . . is entirely consistent with Congress' efforts to combat trafficking in persons") (internal quotation omitted).

<sup>235</sup> 18 USC § 1596(a) (2012).

<sup>236</sup> 18 USC § 1595 (2012).

<sup>237</sup> *Nunag-Tanedo v E Baton Rouge Sch Bd*, 709 F.Supp.2d 1134, 1145 (CD Cal 2011).

situation where ceasing labor would cause a plaintiff serious harm. . . . [T]he *TVPA* not only protects victims from the most heinous human trafficking crimes, but also from additional types of fraud and extortion leading to forced labor.<sup>238</sup> In another case, detainees as a for-profit immigration center successfully sued the management company under the *TVPA* for threatening them with solitary confinement in the event they failed to complete particular, unpaid chores.<sup>239</sup>

## 5 Overlapping frameworks and the prosecution of corporations

### 5.1 The U.S. approach to building cross border cases

In cross-border cases there are both practical and diplomatic reasons for the United States to seek the acquiescence, consent – or preferably the assistance – of the host country’s authorities during a criminal investigation. Accordingly, Congress has endorsed diplomatic efforts to increase multinational cooperative law enforcement activities, and the United States now has over 70 *mutual legal assistance treaties (MLATs)* in force.<sup>240</sup> Although the precise content varies, these agreements generally provide for assistance in matters such as locating and identifying persons or things, service of process, executing search warrants, and taking witness statements.<sup>241</sup> Prosecutors seeking assistance under a *MLAT* do so through the Department of Justice Office of International Affairs.<sup>242</sup> These procedures are generally applicable to cases against both individuals and corporations.

Congress has also enacted a variety of measures to assist foreign law enforcement efforts in the United States with the expectation that that the U.S. will receive reciprocal treatment. For example, the Department of Justice has statutory authority to petition a federal judge to issue search warrants and subpoenas to facilitate investigations in the U.S. by foreign law enforcement authorities.<sup>243</sup>

Certain kinds of cross-border cases require national coordination and approval within the Department of Justice. Before a federal prosecutor may pursue a case involving torture, war crimes, genocide, or child soldiers, he or she must notify, consult, and seek approval from the Human Rights and Special Prosecutions Section of the Criminal Division of the Department of Justice.<sup>244</sup> Similarly, in terrorism prosecutions consultation with the National Security Division and, in particular, by its Counterterrorism Section is required, and prior approval is required in especially sensitive cases.<sup>245</sup> And the *USAM* provides that (1) no prosecution under the *Foreign Corrupt Practices Act (FCPA)* may be instituted without the express authorization of the Criminal Division, (2) any ‘information relating to a possible violation of the *FCPA* should be brought immediately to the attention of the Fraud Section of the Criminal Division,’ and (3) unless otherwise agreed by the head of the Criminal

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<sup>238</sup> *ibid.*

<sup>239</sup> *Menocal v GEO Group, Inc*, 113 F.Supp.3d 1125, 1228 (D Colo 2015).

<sup>240</sup> *Doyle* (n 160) 23.

<sup>241</sup> *ibid* 23–25.

<sup>242</sup> *ibid.*

<sup>243</sup> *ibid* 26.

<sup>244</sup> *USAM* § 9-2.139.

<sup>245</sup> *USAM* §§ 9-2.136–2.138.

Division, attorneys from that section will try *FCPA* cases.<sup>246</sup> The *USAM* explains that this policy is necessary, given the importance of coordination between American agencies as well as international governments in these prosecutorial efforts.<sup>247</sup>

## 5.2 U.S. attitudes toward cross-border jurisdiction

There is a significant difference between the U.S. attitude toward criminal prosecutions and civil actions in cross-border cases. In criminal cases, Congress has enacted legislation extending U.S. jurisdiction for crimes committed abroad, and extraterritorial prosecutions have increased for national security and narcotics crimes.<sup>248</sup> These prosecutions serve as tools of U.S. policy.

In civil cases, in contrast, Congress has been much less active in providing causes of action and enacting laws providing for jurisdiction in the federal court for cross-border cases, and in recent years the U.S. courts have expressed concern that judicial decisions may result in ‘international discord’ and carry foreign policy consequences not intended by the political branches.<sup>249</sup> These concerns have been reflected in decisions construing federal statutes to have only domestic application and restricting the scope of jurisdiction over extraterritorial conduct.<sup>250</sup> These concerns are at their zenith in cases brought by private parties, and play a less important role when the executive branch has taken the foreign policy implications into account before bringing a criminal prosecution.

The scholarly community is divided. Some scholars have argued that judicial development of international law norms without the clear sanction of and direction from the political branches would violate the constitutional principles of federalism and separation of powers. Others have called for the U.S. to have a more robust incorporation of international law, and critics charge that judicial opinions show ‘ambivalence’ and or in extreme cases even ‘hostility’ to applying international law.<sup>251</sup>

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<sup>246</sup> *USAM* § 9-47.110.

<sup>247</sup> For example, the Manual explains:

The investigation and prosecution of particular allegations of violations of the *FCPA* will raise complex enforcement problems abroad as well as difficult issues of jurisdiction and statutory construction. For example, part of the investigation may involve interviewing witnesses in foreign countries concerning their activities with high-level foreign government officials. In addition, relevant accounts maintained in United States banks and subject to subpoena may be directly or beneficially owned by senior foreign government officials. For these reasons, the need for centralized supervision of investigations and prosecutions under the *FCPA* is compelling.

*ibid.*

<sup>248</sup> See text accompanying n 122-23.

<sup>249</sup> See *Kiobel*, 133 S Ct 1659.

<sup>250</sup> See text accompanying n 154-67.

<sup>251</sup> John F. Coyle, ‘The Case for Writing International Law into the U.S. Code’ (2015) 56 *BC L Rev* 433, 433.

### 5.3 Overlapping domestic jurisdictions

Corporations may be held accountable in multiple domestic fora if both a cause of action and jurisdiction exist. Double jeopardy applies only to criminal sanctions.<sup>252</sup> Parallel civil and criminal proceedings are not prohibited, and in some contexts are relatively common.<sup>253</sup> Similarly, a recovery in tort does not necessarily displace any statutory remedy.

In the U.S. courts the problem in obtaining recoveries for financing or other involvement in atrocities abroad is not multiple causes of action, but rather the lack of a cause of action and jurisdiction. Until recently, the principal cause of action for such recoveries was the Alien Tort Statute,<sup>254</sup> but the Supreme Court's recent decisions have restricted the scope of the cause of action under the Act and also given a restrictive interpretation to the federal courts' jurisdiction.<sup>255</sup>

### 5.4 Conflicting international jurisdictions

In interpreting the geographic scope of U.S. law, U.S. courts seek to avoid unreasonable interference with the legitimate sovereign authority of other states.<sup>256</sup> The Supreme Court has referred to this as the principle of 'prescriptive comity.'<sup>257</sup> Additionally, the federal courts apply the *Charming Betsy* principle, which states that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'<sup>258</sup> This principle is applied, however, only when a construction avoiding such a conflict is 'fairly possible.'<sup>259</sup> When such a construction is not fairly possible, 'the federal statute is controlling as a matter of law.'<sup>260</sup>

## 6 Proposals for reform of the legal framework of jurisdiction; alternative solutions to global human rights issues

The UN's *Ruggie Principles*,<sup>261</sup> require states to 'protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises' by 'taking

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<sup>252</sup> This point is explicit in the text of the Sixth Amendment, which provides that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb...."

<sup>253</sup> J Brady Dugan, 'White Collar Crime: Emerging Challenges' in Michael Barta et al., *International White Collar Enforcement: Top Attorneys on Preventative Measures, Regulatory Compliance, and Litigation* (Thomson Reuters/Aspatore 2014) 31.

<sup>254</sup> 28 USC § 1350.

<sup>255</sup> See text accompanying n 209-21.

<sup>256</sup> Restatement (Fourth) § 204.

<sup>257</sup> *F Hoffman-La Roche Ltd v Empagran SA*, 542 US 155, 165 (2004).

<sup>258</sup> *Murray v The Schooner Charming Betsy*, 6 US 64, 118 (1804).

<sup>259</sup> Restatement (Fourth) § 205. Accord Restatement (Third) § 114.

<sup>260</sup> *ibid.*

<sup>261</sup> In 2011, the UN Human Rights Council endorsed UN Special Representative *John Ruggie's* "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework." They read:

"These Guiding Principles are grounded in recognition of:

(a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;

(b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;

appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.<sup>262</sup>

At the national level, there is no consensus on the need for the United States to address global problems, and there are no significant proposals pending to expand the jurisdiction of the U.S. courts to increase the protection of human rights. However, between 1999 and 2016 both Congress and the president have employed U.S. authority at home and abroad to address human rights issues, especially human trafficking.

### 6.1 The lack of consensus on the need to expand the jurisdiction of the U.S. courts

The 2016 American presidential campaign focused on the United States' role in the world, and *President Donald Trump* was elected after a campaign in which he promised to make America great again and put America first. Neither the *Trump Administration* nor the current leadership in Congress seems likely to propose or support legislation making it easier to hold corporations liable.

Although some scholars and human rights groups have been critical of the Supreme Court's decisions restricting the extraterritorial reach of U.S. jurisdiction, those concerns have not yet generated a consensus that reform is needed. Professional groups such as the American Law Institute remain concerned about the role of jurisdiction, but the Restatement (Fourth) on Foreign Relations proposes no significant change in jurisdictional standards to address global problems in the U.S. courts.

### 6.2 Legislative and executive actions to protect human rights

#### 6.2.1 Federal contracting requirements

A series of legislative and executive mandates prohibit federal contractors and subcontractors from engaging in human trafficking, using forced labor in the performance of the contract, and procuring commercial sex acts during the performance of the contract.<sup>263</sup>

#### 6.2.2 Disclosure requirements

To date, the U.S. response to corporate human rights violations has focused heavily on public disclosure to allow consumers to reward or penalize firms based on their human rights records.<sup>264</sup> In December 2016, the *Obama Administration* issued a National Action Plan that proposed establishing a contact point for reporting compliance with the *OECD*

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(c) The need for rights and obligations to be matched to appropriate and effective remedies when breached. These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure."

United Nations, Human Rights Council, 'Implementing the United Nations "Protect, Respect and Remedy" Framework' <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> accessed 3 June 2017.

<sup>262</sup> *ibid.*

<sup>263</sup> See Liana W Rosen, 'Trafficking in Persons and U.S. Foreign Policy Responses in the 114th Congress' (2016) Cong Research Serv, R44581 2-4.

<sup>264</sup> United States Dep't of State, 'Responsible Business Conduct: First National Action Plan for the United States of America' <<https://www.state.gov/documents/organization/265918.pdf>> accessed 3 June 2016.

Guidelines for Multinational Enterprises.<sup>265</sup> The plan did not call for the enactment of new legislation or for the use of criminal liability.<sup>266</sup> Similarly, California adopted legislation requiring the every retail seller and manufacturer doing business in California and having annual worldwide gross receipts that exceed \$ 100 million to disclose its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale.<sup>267</sup>

### 6.2.3 *Foreign aid*

The United States has employed foreign aid as a means of reducing human trafficking abroad. The *Trafficking Victim Protection Act* of 2000 mandated the establishment of the State Department's Office to Monitor and Combat Trafficking in Persons, which, inter alia, oversees the publication of an annual Trafficking in Persons Report and the administration of international grants programs seeking to combat human trafficking.<sup>268</sup>

In December 2016 (before the *Trump administration* took office), Congress enacted legislation authorizing funding for anti-slavery programs and projects outside the United States.<sup>269</sup> Although many of these details were not included in the final legislation, Senator *Bob Corker*, the bill's principal sponsor, envisioned a non-profit, grant-making foundation funding programs and projects that would '[c]ontribute to the freeing and sustainable recovery of victims of modern slavery, prevent individuals from being enslaved, and enforce laws to punish individual and corporate perpetrators of modern slavery.'<sup>270</sup> He indicated that the foundation would seek to raise \$ 1.5 billion, more than 80 percent of which would come through matching funds from the private sector and foreign governments.<sup>271</sup>

## 7 Conclusion

Although the doctrine of respondeat superior provides a broad basis for corporate criminal liability under federal law, a corporation's responsibility for acts committed abroad depends on the existence and the interpretation of statutes.

Because federal law does not recognize 'common law crimes,' all federal crimes must be authorized by statute. Accordingly, it is not sufficient for the prosecution to demonstrate that conduct violates international law, or that the U.S. has signed a treaty that requires signatories to prosecute certain crimes. No federal criminal prosecution may be brought

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<sup>265</sup> *ibid.*

<sup>266</sup> *ibid.*

<sup>267</sup> Cal Civ Code, § 1714.43 ("California Transparency in Supply Chains Act of 2010").

<sup>268</sup> For a discussion of the legislation and its implementation, see Rosen (n 263) 3-4. For an analysis of the effectiveness of the TIP program, see Judith Kelley, *Scorecard Diplomacy: Grading States to Influence their Reputation and Behavior* (Cambridge Univ Press 2017) (concluding despite lacking traditional force, public grades are potent symbols that can evoke countries' concerns about their reputations and motivate them to address the problem).

<sup>269</sup> National Defense Authorization Act for Fiscal Year 2017, PL No 114-328, § 1298(b) (2016).

<sup>270</sup> 'Corker: Bill to Launch End Modern Slavery Initiative to Become Law' (United States Senator Bob Corker, 8 December 2016) <<https://www.corker.senate.gov/public/index.cfm/2016/12/corker-bill-to-launch-end-modern-slavery-initiative-to-become-law>> accessed 15 October 2017.

<sup>271</sup> *ibid.*

unless Congress has implemented international law or a treaty obligation by enacting a federal criminal statute. Congress has implemented international law rules into U.S. law on many occasions in the past several decades, including legislation giving effect to the Chemical Weapons Convention, the Convention on Cybercrime, and international commitments to prosecuting sex crimes against children.<sup>272</sup> On the other hand, Congress has shown increasing ‘hostility’ to international law, and in recent years, international human rights laws appear to have provoked the strongest Congressional opposition.<sup>273</sup> The one exception to this trend is the bipartisan support for measures to address human trafficking, especially sex trafficking.<sup>274</sup>

Once legislation has been enacted, the scope of crimes that may be prosecuted in the U.S. turns on the judicial interpretation of the relevant statutes. Over the past fifteen years, the Supreme Court has emphasized rules of statutory interpretation that significantly restrict the scope and application of federal statutes: a presumption against giving federal law extraterritorial effect<sup>275</sup> and principles of ‘prescriptive comity’ that seek to avoid unreasonable interference with the legitimate sovereign authority of other states.<sup>276</sup>

Neither the *Trump Administration* nor the current leadership in Congress seems likely to propose or support legislation making it easier to hold corporations liable.

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<sup>272</sup> See 2.12.2.

<sup>273</sup> Coyle (n 251) 449–450.

<sup>274</sup> See text accompanying n 232–39.

<sup>275</sup> *RJR Nabisco, Inc. v European Community*, 136 S Ct 2090 (2016).

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## **ANNEX**



# QUESTIONNAIRE FOR SECTION IV: PROSECUTING CORPORATIONS FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW: JURISDICTIONAL ISSUES

## 1 Introduction

Jurisdiction must be based on a link between the alleged crime and the competence of the state that exercises judicial authority. Following the Westphalian sovereignty logic, territory has served as the predominant link, after it had gradually replaced the personality principle. In criminal law, however, concurrent jurisdictional claims have always been present and have recently gained new importance due to a movement of holding corporations accountable not only for domestic but also for international *core crimes* (those included in the jurisdiction of the International Criminal Court, ICC), as well as *treaty crimes* (for instance, corruption, environmental crimes, trafficking crimes, financial crimes, tax crimes, etc.). The U.N. Human Rights Council set a global standard by adopting the United Nations Guiding Principles on Business and Human Rights (UNGPs or *Ruggie principles*<sup>1</sup>), which address possible adverse impact on human rights linked to business activity. According to that standard not only have states a duty to protect human rights, but corporations must respect them, too, and victims of business-related abuses must have access to a legal remedy.

Your report should explain your country's approach to jurisdictional issues related to Corporate Criminal Responsibility (CCR), focusing on cases of alleged international law violations by corporations, with a special emphasis on extraterritorial jurisdiction. The questionnaire, however, also asks about the general framework of national law as the basis of cross-border prosecution of white-collar crime

## 2 General Framework for Prosecuting Corporations for Violations of International Criminal Law

Please, briefly cover your country's law in theory and in practice, as well as the public debate with regard to the task of prosecuting corporations for core crimes and/or "treaty crimes" committed abroad, using the following questionnaire ...

### 2.1 Legal Framework & Relevant Actors

#### 2.1.1 *Legal Rules governing the prosecution of corporations – in a nutshell*

##### *Substantive Criminal Law establishing criminal liability*

What is the doctrinal basis (attribution of individual fault to the corporation, or "corporate blame")? Is corporate criminal liability limited to specific offenses?

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<sup>1</sup> UNHRC 17/4 of 16 June 2011, A/HRC/17/L.17/Rev1,  
<<http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session17/Pages/ResDecStat.aspx>>.

*Procedural Law governing criminal prosecution & Actors (Prosecution and other authorities, victims, NGOs, courts)*

What is the procedural framework for prosecuting a corporation? Are there special rules, especially for fact-finding? How is the corporation represented in court? Is it possible to try a corporation (or an individual) in absentia?

## 2.2 Principles of Jurisdiction /Building the nexus – in a nutshell

Please explain your country's general rules and laws on jurisdiction with regard to transnational crime. What is the underlying rationale? Is your country traditionally actively interested in prosecuting offenses committed abroad? Is the passive personality principle recognized? May the set-up of criminal liability of corporations combined with the concept of territorial jurisdiction create areas of impunity for responsibility or do they rather build up for vehicles for foreign claims?

*Defining jurisdiction – in a nutshell*

How is jurisdiction specified in your national system? Does your country distinguish between jurisdiction to prescribe and jurisdiction to adjudicate?

## 2.3 International Law / Human rights framework

Please indicate the relevant international conventions/ human rights framework that may determine your country's prosecution of "core crimes" or "treaty crimes".

## 2.4 Framework for Prosecuting a Cross-Border Case – in a nutshell

How is a cross-border case built in your criminal justice system? (When) Must the defendant be pre-sent? Is there a difference between cases against individuals and cases against corporations?

## 2.5 Prominent cases, media coverage

In your country, have prominent cases triggered a public debate? Does the media discuss the usefulness and legitimacy of prosecuting corporations for violations of international law abroad?

## 2.6 Statistics

Do prosecution or court statistics contain data on CCR, especially on prosecution/conviction of corporations for violations of international criminal law?

## 2.7 Public debate on Corporate Social Responsibility?

Has the accountability of corporations and their compliance with the law and certain ethical standards been subject to recent debate? Has there been a debate on CCR, including the exclusion of CCR in Art. 25 ICC Statute? More specifically, has there been a debate on differences between corporations' accountability for their domestic conduct and their conduct abroad? Is there a political movement concerning CCR? (cf. in Switzerland <<http://www.droitsansfrontieres.ch/fr/agenda/>>). What is the role of NGOs in that regard?

### 3 Holding Corporations Accountable – the Jurisdictional Issue

#### 3.1 General Jurisdiction / General Aspects of Jurisdiction

##### 3.1.1 General Jurisdiction – Generals

Is there a general doctrine underlying the rules of jurisdiction? If so, is the decision on jurisdiction rather based on a “jurisdictional reasonableness”-approach primarily taking into account the affected states’ interests? Or does the balancing of interests seek to do justice to the defendant? Does the prosecution of corporations for crimes allegedly committed abroad fit into that doctrine?

##### 3.1.2 Territorial Jurisdiction

Is territoriality the standard parameter for establishing jurisdiction? If so, what is the historical context and the justification of the preference for territoriality? (e.g., right to be tried by one’s peers? “Recht auf den gesetzlichen Richter?” Evidentiary concerns? National concerns?).

##### *Legal Framework*

What are the statutory rules defining territorial jurisdiction, and what is their historical context? Can territoriality be based on where the defendant has acted and/or where his act took had its effect?

##### *Practice; (High Court) Jurisprudence*

How do courts handle territoriality, especially with respect to cross-border crimes? Do courts tend to restrict or broaden the concept of territoriality? Do they emphasize the “conduct doctrine” or the “effects doctrine”? Does case law address the concepts of “objective territoriality” (act has been initiated abroad, but completed on one’s territory) and “subjective territoriality” (act has been initiated on one’s territory, but completed abroad)? Does case law address the evidentiary problems of fact-finding abroad?

##### 3.1.3 Extraterritorial Jurisdiction

Does your criminal justice system have a presumption against extra-territorial jurisdiction? If so, do courts take the presumption seriously? Which interests are recognized bases of extraterritorial jurisdiction (e.g., state interests affected, nationality of alleged offender)?

##### *Active Personality (or Nationality) Principle*

###### – Generals

If your country recognizes the active personality principle, what is the underlying rationale (e.g., avoiding impunity of nationals, protecting state’s reputation abroad)? What are the constitutive elements of this principle? Does the law take into consideration whether the act also constitutes a crime according to domestic law? Does the principle extend only to serious crimes? Is the principle regarded as an exception and used reluctantly?

###### – Corporations and the Active Personality Principle

May corporations be held liable under the active personality principle, or does it extend only to natural persons? May corporations be prosecuted only for certain economic offenses? How is nationality of corporations established (e.g., “control theory”, place of registration)?

### *Passive Personality Principle*

#### – Generals

Does your country extend its jurisdiction in accordance with the passive personality principle? Is that principle regarded as having equal rank with other principles of jurisdiction? What are the requirements for jurisdiction under that principle? Does it only extend to serious offenses or only to terrorism? Is the principle regarded as an exception and used reluctantly (e.g., only if your country’s nationals are not protected abroad, or if an alleged wrongdoer cannot be extradited)? Are there substitutes for criminal prosecution under the passive personality principle, e.g. torts claims?

#### – Corporations and the passive personality principle

May corporations be held liable under the passive personality principle, or does it extend only to natural persons? Is it applicable only to certain economic offenses? How is nationality of corporations established (e.g., “control theory”, place of registration)?

### *Protective Principle*

#### – Generals

Does your country extend its jurisdiction in accordance with the protective principle? Is that principle regarded as having equal rank with other principles of jurisdiction? What are the requirements for jurisdiction under that principle? What state interests are protected? Does the protective principle only extend to serious offenses or only to terrorism? Is your country concerned that the protective principle might be abused (by other countries), e.g., to prosecute political opponents? Does your country fear that the use of the protective principle could harm international relations?

#### – Corporations and the passive protective principle

Are corporations targeted under the regime of secondary boycotts, i.e. extraterritorial measures in order to enforce a (international) boycott (as for instance under the U.S. Helms-Burton Act)? Are there substitutes for criminal prosecution under the protective principle, e.g. torts claims?

### *Jurisdiction over military personnel and/or private military contractors*

Does your country establish criminal law jurisdiction over persons acting under its military order? If so, does this jurisdiction apply in the same way to private military contractors or other outsourced services staff?

### *Vicarious Jurisdiction – Stellvertretende Strafrechtspflege*

Does your country prosecute alleged offenders acting for another State, if extradition is not possible? If so, under what conditions?

### 3.1.4 *Universal jurisdiction*

Does your criminal justice system apply universal jurisdiction? If so, for which offenses? Do courts make frequent use of the universality principle? Is the principle applied even when the alleged offender is not present in your country?

Are there cases where the universality principle has been applied to corporations?

### 3.1.5 *Other sources of jurisdiction*

Has your legal system established other, “creative” grounds of jurisdiction in order to hold corporations liable? Has the effects doctrine been interpreted broadly in order to extend jurisdiction to foreign corporations? Do such bases of jurisdiction exist for typical white collar-crimes, for instance, violations of anti-trust law?

### 3.1.6 *Transitional justice mechanisms*

Are there special rules on extraterritorial jurisdiction for special justice mechanisms, e.g., truth and reconciliation commissions, local justice, reparation schemes for victims?

## 3.2 Jurisdiction for Prosecuting Corporations under International Law (UN Law, multi-lateral treaties)

### 3.2.1 *General*

Does your country base its jurisdiction on international treaty or customary law? Are there any requirements for establishing such jurisdiction (e.g., seriousness of the offence, evidence to be found in your country, international law demanding prosecution)? Is there an underlying doctrine supporting this jurisdiction? If so, is it a standard of “jurisdictional reasonableness” that primarily takes the affected states’ interests into account? Or is it a balancing of interests that seeks to do justice to the defendant?

### 3.2.2 *Jurisdictions prescribed by International Humanitarian Law – Core Crimes*

Has your country implemented the jurisdictional requirements of International Humanitarian Law? What are the constitutive elements? Are there any specifics?

### 3.2.3 *Jurisdiction based on Customary International Law*

Does your country acknowledge jurisdiction based on Customary International Law? If so, under what conditions and on which offenses?

## 4 **Overlapping Domestic Legal Frameworks and the Prosecution of Corporations**

### 4.1 Conflicts of jurisdiction – General

Please assess whether your system is rather dominant or reluctant in claiming jurisdiction in cross border-cases. Do you think that there is rather a problem of positive or of negative conflicts of jurisdiction?

#### 4.2 Overlapping Domestic jurisdictions – in a nutshell

Can corporations be held accountable in collateral legal domestic frameworks (torts, administrative sanctions oa) for providing financing or other involvement in atrocities abroad?

#### 4.3 Conflicting International jurisdictions – in a nutshell

In your national system, do specific provisions or case law address problems of international jurisdiction conflicts, when prosecuting corporations for “core crimes” or “treaty crimes” abroad (either with regard to prosecution in another country, civil or administrative litigation or settlements in arbitration courts)?

### 5 Proposals for Reform of the Legal Framework of Jurisdiction

In your state, is there a discussion about the role of rules on jurisdiction for defending sovereignty or for fixing global problems?

### 6 Conclusion

How does your criminal justice system generally address the issue of corporate criminal responsibility for acts committed or having effects abroad? Is there a movement – inside or outside the legal community – in favour of holding corporations accountable in such cases? Are there general doctrines that deal with this situation? Are reforms of the law foreseeable?

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