

**Sabine Gless &  
Sylwia Broniszewska-Emdin (Eds.)**  
**Prosecuting Corporations  
for Violations of International  
Criminal Law: Jurisdictional Issues**

(International Colloquium Section IV, Basel, 2-4 June 2017)

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

(International Colloquium Section 4,

Basel, 21-23 June 2017)

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Edited by

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**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 have become increasingly important in the global economy, particularly in the function on business models founded upon worldwide access to resources like materials, labour, and corporate-friendly legal frameworks, they have become important players when it comes to enforcing relevant international standards. As such, the *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 protection of human 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 Peeters, '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 – The 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 Pénal suisse à l'égard de l'infraction reprochée à l'entreprise. in International law* (Schulthess, Genève 2017) 333-334.

<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 financial and diversity information by certain large undertakings and group, OJ L 330 of 15.11.2014, 1, [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 Mastronardi 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/konzernverantwortungsinitiative-die-initiative-ist-eine-mogelpackung-1d.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, 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, and 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,

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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 tehdystä 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?', 13 *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) 1 *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* (Helbling 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, 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 retain legislation that contradicts the traditional principle of *societas delinquare non potest*, claiming that only human beings (natural persons) can be bound by criminal law.<sup>31</sup> This dispute 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 operating along the supply chain. Looking at the cases presented in the country reports, it appears that the engagement of Non-Governmental Organizations (NGOs) acting with 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 Australian 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

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<sup>29</sup> Cf John C Coffee, 'Corporate Criminal Liability: An Introduction and Comparative Survey' in Albin E. Götz, Günter Heine and Barbara Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (Edition IusComm, 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 'Report 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 1 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 6ª Turma RMS 39.173-BA, Rel Min Reynaldo Soares da Fonseca, julgado em 6/8/2015 (Info 566). STF 1ª 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’, BGBI 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 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 *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

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

<sup>47</sup> Unauthorised disclosure of information (*descubrimiento y revelación de secretos*), art 197 quinque 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 Eijsbouts 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 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 Bebauung 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 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 scholars adhere to the belief that liability based on administrative offences is adequate. 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 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 committed by its legal or contractual manager, or by its organs, on the interest or benefit of the entity.' Article 1 in 9605/98; Article 173 (...) Paragraph 5. 'The law shall, without prejudice to the individual liability of 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' money.' 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, by 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 state exercises

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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 Aguinezàbal, '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, Ulfried Neumann and Hans-Ullrich 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 SCt 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 alleged committed within its borders.<sup>93</sup> As is well known from domestic law, where a crime determined to have happened is not only a geographical question but also a legal one. 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 offence 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. They 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. 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*: judgment of the Hooge Rat: HR 14 September 1981, ECLI:NL:1981:AC3699, ro 4; HR 2 February 2012, ECLI:NL:HR:2010:BK6328, ro 2.4. See also *Austria*: OGH: 12 Os 111/06z; 12 Os 120/91; 10 Os 16/69; Ev 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 2014) 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> 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 the same and 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 would 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 that it has the 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 the 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 law at the 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, expands universal jurisdiction to the effects of criminal justice policy and subsequently possible 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 concern 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 requirement.

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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 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 Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World' (2013) 15 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 by 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 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 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 be 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

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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 extraterritoriality (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>> accessed 23 February 2018; *The*

Nestle and Cargill for use of child slave labour in the production of chocolate was also in the U.S. based upon the Alien Tort Statute and initially saw some movement forward, was recently overturned by a U.S. district court judge.<sup>162</sup> Despite variable success in 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, 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 against 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

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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 Petterson, '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.*, U.S., 2013; Tribunal cantonal, Canton de Vaud, Decision from 17 September 2013, Nr. PE12.010550-FMO; Swiss Bundesgericht 6B\_7/2014 from 21 July 2014; *Prosecutor v Van Anraat*, Netherlands, LJN: BA6/2014; Gerechtshof's-Gravenhage, 2200050906-2, 9 May 2007; Arrêt du Tribunal Administratif de Toulouse, 2ième chambre, 16 May 2006, n. 0104248; *United States of America v Carl Krauch, et al.*, (I.G. Farben, see 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. 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, <[<sup>169</sup> See, Davide Scruzi, 'Goldraffinerie steht auch ohne Straftaten in der Kritik' \*Neue Zürcher Zeitung\* \(Zürich, 2 June 2015\) <https://www.nzz.ch/schweiz/goldraffinerie-steht-auch-ohne-schafftaten-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 Geldwäscherie 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 \(Open Society Institute 2011\).](http://www.fnp.de/nachrich-ten/politik/bdquo-Die-Menschen-hatten-Todesangst-ldquo;>http://www.fnp.de/nachrich-ten/politik/bdquo-Die-Menschen-hatten-Todesangst-ldquo;</a>; art 673,1736733> accessed 1 September 2016.</p></div><div data-bbox=)

<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 range 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 notion 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 modifications – 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 is changing 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, 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/annualreportontheguidelines.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-09-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 (2011).

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

*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 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 enable effective investigation, prosecution, and adjudication of corporate human rights abuses;
  - b. consider making corporate liability conditional on factors such as corporate negligence, or lack of due diligence;
  - c. define concepts of corporate liability so as to have regard to the economic reality 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 their 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 occurrence of harm as well as when it was the place of the occurrence of the wrong conduct, in whole or in part.

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<sup>2</sup> <<http://mneguidelines.oecd.org/annualreportsonguidelines.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, 20-24 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.