

# RIDP

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

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

Revue Internationale de Droit Pénal  
International Review of Penal Law  
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Международное уголовное право  
刑事法律国际评论  
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Edited by

S GLESS  
S BRONISZEWSKA-EMDIN

## **RIDP**

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# INTRODUCTION

*By Sabine Gless \**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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