

**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)

Revista International de Dretul Penal
International Review of Penal Law
Rivista Internazionale di Diritto Penale
Международное обзорное уголовное право
刑事法国际评论
الكتاب المقارن الجنائي الدولي
Revista Internazionale di Diritto Penale
Revista internacional de derecho penal
Internationale Revue für Strafrecht



Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues

(International Colloquium Section 4,

Basel, 21-23 June 2017)

Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues

(International Colloquium Section 4,

Basel, 21-23 June 2017)

Edited by

S GLESS
S BRONISZEWSKA-EMDIN

RIDP

Revue Internationale de Droit Pénal

International Review of Penal Law

Revista internacional de Derecho Penal

Международное обозрение уголовного права

国际刑事法律评论

المجلة الدولية للقانون الجنائي

Revista Internacional de Direito Penal

Rivista internazionale di diritto penale

Internationale Revue für Strafrecht



Maklu

AIDP – Association Internationale de Droit Pénal | The International Association of Penal Law is the oldest association of specialists in penal law in the world. Since 1924, it is dedicated to the scientific study of criminal law and covers: (1) criminal policy and codification of penal law, (2) comparative criminal law, (3) international criminal law (incl. specialization in international criminal justice) and (4) human rights in the administration of criminal justice. The Association's website provides further information (<http://www.penal.org/>).

RIDP – Revue Internationale de Droit Pénal | The International Review of Penal Law is the primary medium and the core scientific product of the Association. This peer-reviewed journal seeks to contribute to the development of ideas, knowledge and practices in the field of penal sciences. Combining international and comparative perspectives, the RIDP covers general theory and penal philosophy, general penal law, special penal law, criminal procedure and international penal law. The RIDP is published twice a year. At least one issue a year is dedicated to the Association's traditional scientific activities and is linked to an annual AIDP conference, a world conference or, every five years, the International Congress of Penal Law. The other issue will occasionally be dedicated to a single, topical scientific theme, chosen by the Scientific Committee of the Association. For both issues, submissions will be made upon invite.

Peer review: Contributions to this journal are subject to peer review either internally through the Editorial Board at large and the assessment of its Executive Committee or externally by organizing expert colloquia. The experts are required to review each other's papers, or through a combination of both methods. This process shall be documented by the Editor.

Disclaimer: The statements and opinions made in the RIDP contributions are solely those of the respective authors and not of the Association or MAKLU Publishers. Neither of them accepts legal responsibility or liability for any errors or omissions in the contributions nor makes any representation, express or implied, with respect to the accuracy of the material.

© 2018 Sabine Gless and Sylwia Broniszewska-Emdin (Editors) and authors for the entirety of the edited volume and the authored chapter, respectively. All rights reserved: contributions to the RIDP may not be reproduced in any form, by print, photo print or any other means, without prior written permission from the author of that contribution. For the reproduction of the entire publication, a written permission of the Editors must be obtained.

ISSN – 0223-5404
ISBN 978-90-466-0933-0
D2018/1997/14
NUR 824

Maklu- Publishers
Somersstraat 13/15, 2018 Antwerpen, Belgium, info@maklu.be
Koninginnelaan 96, 7315 EB Apeldoorn, The Netherlands,
info@maklu.nl
www.maklu.eu

USA & Canada
International Specialized Book Services
920 NE 58th Ave., Suite 300, Portland, OR 97213-3786,
orders@isbs.com, www.isbs.com

Editorial Board

Executive Committee

General Director of Publications & Editor-in-Chief | Ge VERMEULEN, Ghent University, BE

Honorary Director | Reynald OTTENHOF, University of Nantes FR

Co-Editor-in-Chief | Cristina MAURO, University of Poitiers, F

Editorial Secretary | Ligeia QUACKELBEEN, Ghent University BE

Editors | Isidoro BLANCO CORDERO, University of Alicante, E | Michele PAPA, University of Florence, IT | Nina PERSAK, Ghent University, BE | Christopher BLAKESLEY, University of Nevada Las Vegas, USA

AIDP President | John VERVAELE – Utrecht University, NL

Vice-President in charge of Scientific Coordination | Katalin LIGETI, University of Luxembourg, LU

Scientific Committee - Executive Vice-President | Jean-François THONY, Procureur général près la Cour d'Appel Colmar, FR | *Vice-President in charge of External Relations* | Helmut EPPLER, Judge, AT – *Secretary General* | Carlos E.A. JAPIASSU, UFRJ/UFRJ/UNESA, Rio de Janeiro, BR – *Secretary of Scientific Committee* | Stanislaw TOSA, Utrecht University, NL – *Vice-Presidents* | Luis ARROYO ZAPATERO, Universidad de Castilla-La Mancha, ES | Jacques BUISSON, Université de Jean Moulin, F | Raimo LAHTI, University of Helsinki, FI | Michael SCHAREK, Case Western Reserve University, USA | Ulrich SIEBER, University of Freiburg, DE | Alfonso STILE, University of Rome, IT | Christiaan VAN DEN WYNGAERT, ICC, NL | Eugenio Raúl ZAFFARONI, Corte Interamericana de Derechos Humanos, CR – *Members* ZHAO Bing Zhi, Beijing Normal School, CN | Juan Luis GÓMEZ-COLOMER, Universidad Jaume I, FR | Sabine GLESS, University of Basel, CH | Lorenzo PICOTTI, University of Verona, IT | Juliette TRICOT, l'Université Paris Ouest Nanterre La Défense, FR | Thomas WEIGEND, University of Cologne, DE | Chenguan ZHAO, University of Freiburg, DE – *Young Penalists* | Wendy D. BONDIT, Ghent University, BE | Eduardo SAAD-DINIZ, University of São Paulo, BR

Committee of Reviewers - Members | Steve BECKER, Assistant Appellate Defender, USA | Gleb BOGUSH, Moscow State University, RU | Peter CSONKA, JHA Coordinator, BE | José Luis DE LA CUESTA, Universidad del País Vasco, ES | José Luis DIEZ, RIPOLLÉS, Universidad de Málaga, ES | LU Jianping, Beijing Normal University, CN | Sérgio Salomão SHÉCAIRÁ, Universidade de São Paulo, BR | Eileen SERVIDIO-DELABRE, American Graduate School of International Relations & Diplomacy, FR | Françoise TULKENS, Université de Louvain, BE | Emilio VIANCO, American University, USA | Thomas WEIGEND, University of Cologne, Germany – *Young Penalists* | Ersi BOZHEKU, Sapienza University of Rome, IT | Megumi OCHI, Kyoto University, JP

Honorary Editorial Board - M. Cherif BASSIOUNI, DePaul University, USA | Mireille DELMAS-MARTY Collège de France, FR | Alfonso STILE, Sapienza University of Rome, IT | Klaus TIEDEMANN, University of Freiburg, DE | Christine VAN DEN WYNGAERT, ICC, NL | Eugenio Raúl ZAFFARONI, Corte Interamericana de Derechos Humanos, CR

Summary

Introduction by <i>Sabine Gless</i>	7
---	---

Conference Proceedings and Results

General Report on Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues by <i>Sabine Gless and Sarah Wood</i>	13
Final Resolutions on Prosecuting Corporations for Violations of International Criminal Law: Jurisdictional Issues	41

Transversal Reports

Corporate Criminal Responsibility For Human Rights Violations: Jurisdiction and Reparations by <i>Kenneth S Gallant</i>	47
---	----

National Reports

Australian Report on Prosecuting Corporations for Violations of International Criminal Law by <i>Radha Ivory and Anna John</i>	81
Dutch Report on Prosecuting Corporations for Violations of International Criminal Law by <i>Emma van Gelder and Cedric Ryngaert</i>	113
Finish Report on Prosecuting Corporations for Violations of International Criminal Law by <i>Dan Helenius</i>	149
French Report on Prosecuting Corporations for Violations of International Criminal Law by <i>Juliette Lelieur</i>	179
German report on Prosecuting Corporations for Violations of International Criminal Law by <i>Martin Böse</i>	213
Italian Report on Prosecuting Corporations for Violations of International Criminal Law by <i>Gabriella Di Paolo</i>	235
Russian Report on Prosecuting Corporations for Violations of International Criminal Law by <i>Gleb Bogush and Vitaly Beloborodov</i>	267
Swiss Report on Prosecuting Corporations for Violations of International Criminal Law by <i>Mark Pieth</i>	285
United States' Report on Prosecuting Corporations for Violations of International Criminal Law by <i>Sara Sun Beale</i>	307

Annex

Questionnaire For Section Iv: Prosecuting Corporations For Violations Of International Criminal Law: Jurisdictional Issues by <i>Sabine Gless</i>	347
---	-----

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.'¹ 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 2011,² 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

* Sabine Gless holds a chair for Criminal Law and Criminal Procedure at the University of Basel; Sarah Wood holds a doctorate of jurisprudence and master's degree in international legal studies from Golden Gate University School of Law in San Francisco, California.

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

² <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 28 March 2018.

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

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 treaties⁵ 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.⁶ This points to the core problem addressed throughout this issue, which is at the heart of the General Report: what are the domestic possibilities to adjudicate corporations for alleged crimes connected to incidents abroad?

For the purpose of drafting the General Report, a questionnaire was provided to the national AIDP Groups. Its preamble frames the topic in the perspective of the recent discussion on criminal liability of corporations for severe crime committed abroad; that is, jurisdiction must be based on a link between the alleged crime and the competence of the state that exercises judicial authority. Following the Westphalian sovereignty logic, territory has served as the predominant link, after gradually replacing the personality principle. In criminal law, however, concurrent jurisdictional claims have always been present and have recently gained new status due to the movement of holding corporations accountable not only for domestic but also for international *core crimes* (those included in the jurisdiction of the International Criminal Court, ICC), as well as *treaty crimes* (for instance, corruption, environmental crimes, trafficking crimes, financial crimes, tax crimes, etc.). When the UN 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 genera

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

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

⁵ UN Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 on 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.

⁶ 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 changed 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.⁷

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

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

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

⁷ 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.

⁸ 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.