

COUNTRY REPORT - AUSTRIA

*By Ingeborg Zerbes **

1 Introduction

The question of criminal (co-)responsibility of corporations for serious international crimes affecting human rights relates to a typical structural element of the global economy: the corporate centres of power where decisions are made are located far from the place where the actual violation takes place, i.e. in the parent company in the industrialised world, while the processing of raw materials and production are outsourced to poorer countries with less stable democracies. A socio-ethical co-responsibility of US American and European companies for human rights violations in distant crisis areas is therefore an obvious consequence: products are manufactured cheaply in poverty regions and crisis areas at the expense of the livelihood and rights of the people living there, natural resources are exploited, dangerous waste is disposed of, and all this is made possible by the corruption of officials, resettlement of people and poor working conditions while profits are maximised and consumption is promoted in the industrialised countries.¹

This apparent imbalance has motivated the development of the Ruggie principles focussed on here: a codex on the basis of (mere) soft law, according to which multinational corporations are required to carefully exercise their socio-ethical co-responsibility for the living and working conditions at their production sites abroad, in other words the self-commitment of powerful economic actors to the protection of human rights.

Following the (simplifying) dichotomy of industrial, affluent countries on the one side and unstable countries serving as production sites and suppliers of raw materials on the other, Austria belongs to the first category. In Austria's economy, however, small and medium-sized enterprises are prevalent, which participate in the regional rather than the world market. Efforts to hold multilateral corporations responsible here for harmful effects of their

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¹ Ingeborg Zerbes, 'Individuelle Geschäftsherrenhaftung für Auslandstaten', in Peter Lewisch (ed) [2015] *Jahrbuch Wirtschaftsstrafrecht und Organverantwortlichkeit* 10; Mark Pieth, 'Die strafrechtliche Haftung der schweizerischen Muttergesellschaften für Straftaten in ausländischen Tochterunternehmen', in FS Sutter-Somm (Schlthess 2015); Miriam Saage-Maaß, 'Ahndung wirtschaftsverstärkter Kriminalität – Geschäftsherrenhaftung als Ansatz zur Strafverfolgung leitender Manager für Menschenrechtsverletzungen im Konzern?' [2014] NK 228 ff; Ingeborg Schwenzer, Alain Hosang, 'Menschenrechtsverletzungen – Schadenersatz vor Schweizer Gerichten', [2013] *Zeitschrift für internationales und europäisches Recht* 273 ff.

activities abroad are thus not yet at the centre of public debate, though they have been recognised.²

In the context outlined here we are concerned with a particular responsibility of corporations: their criminal responsibility for international crimes. Before discussing the jurisdiction of Austrian prosecution authorities for such crimes, we should therefore take a look at criminal liability within substantive criminal law: only a wrongful breach of duty can be liable to prosecution – such conduct must therefore be identified in the corporation that is to be held liable. The corporations to be discussed below with regard to their liability under (Austrian) criminal law typically conduct their foreign transactions through economically dependent, but legally independent subsidiaries, sometimes within a group relationship. The relevant ‘international crime’ therefore frequently takes place under the primary co-responsibility of this subsidiary, which might decide to inappropriately dispose of dangerous waste too close to a populated region or take part in the illegal displacement of village inhabitants or offer inhuman working conditions etc.

Such crimes can only be attributed to the parent company in Austria, if breach of duty with regard to the international crime can (also) be detected in the parent company, e.g. if the subsidiary has received an explicit order from the parent company or the parent company does not take any action against (known) abuses in foreign transactions.

The latter situation relates to the supervisory duties of a parent company with regard to an independent subsidiary, which have not been conclusively determined so far. In criminal law literature, such responsibilities are frequently presumed to exist, but not based on company and corporate law as would be required.

A further obstacle to the attribution of criminal liability to the parent company might arise if the crime for which the subsidiary in the foreign country is co-responsible is not directly related to business transactions and has therefore no **relation to the business**. The Swiss-German case Danzer³ may serve as an example. The crimes initiated by the subsidiary – bodily injuries, rapes etc. – against the village inhabitants are not related to business activities.⁴ Since the parent company and the subsidiary are economically linked only and supervision is generally restricted to these relations, the attribution of such **excessive acts** to the parent company might be excluded.

² Ingeborg Zerbes, ‘Individuelle Geschäftsherrenhaftung für Auslandstaten’, in Peter Lewisch (ed) [2015] *Jahrbuch Wirtschaftsstrafrecht und Organverantwortlichkeit* 9 ff.

³ Cf. Miriam Saage-Maaß, ‘Ahndung wirtschaftsverstärkter Kriminalität – Geschäftsherrenhaftung als Ansatz zur Strafverfolgung leitender Manager für Menschenrechtsverletzungen im Konzern?’ [2014] NK 235 f.

⁴ From the Austrian point of view Ingeborg Zerbes, ‘Individuelle Geschäftsherrenhaftung für Auslandstaten’, in Peter Lewisch (ed) [2015] *Jahrbuch Wirtschaftsstrafrecht und Organverantwortlichkeit* 24 ff.

2 General Framework for Prosecuting Corporations for Violations of International Criminal Law

2.1 Legal Framework & Relevant Actors

2.1.1 Legal Rules governing the prosecution of corporations

a) Substantive Criminal Law establishing criminal liability

CCR was introduced in Austria in 2005 by the Law on the Responsibility of Corporations ('Verbandsverantwortlichkeitsgesetz', VbVG, BGBl I 2005/151, in force since 2006-01-01), establishing genuine criminal liability: the prosecuting authorities investigate and the competent court delivers a judgment. There is no restriction to certain offences.

The penalty provided is a forfeit ('Verbandsgeldbuße'). A suspended sentence ('bedingte Nachsicht') is possible (§§ 4-6 VbVG); it may be combined with instructions ('Weisungen') like the charge to provide compensation or to introduce corresponding compliance measures for prevention.

According to the Austrian approach, corporate criminal liability is always tied to the criminal offence of a natural person, § 3 VbVG. First, two alternative conditions are established (para. 1), providing that the corporation is only responsible for an offence **related** to business operations. This is only the case if

- the corporation is either a beneficiary of the criminal offence ('die Tat zu seinen Gunsten begangen worden ist', Z 1) or
- the offence has violated the corporation's obligations ('durch die Tat Pflichten verletzt worden sind, die den Verband treffen', Z 2).

Secondly, if one of these conditions is fulfilled, two types of (individually committed) offence are provided for.

- § 3/2 implements the so-called identification model based on the unlawful and culpable action of a senior decision-maker:

'The corporation is responsible for crimes committed by a decision-maker if the decision-maker as such unlawfully and culpably committed the offence'.⁵

The corporation is (also) immediately responsible for such an offence since the decision-maker acts on behalf of the corporation he represents. His culpable conduct is therefore at the same time regarded as culpable conduct of the corporation.

- § 3/3 then establishes CCR for criminal offences unlawfully committed by other employees (Z 1). In such cases, the individual offender cannot be identified with the

⁵ Für Straftaten eines Entscheidungsträgers ist der Verband verantwortlich, wenn der Entscheidungsträger als solcher die Tat rechtswidrig und schuldhaft begangen hat.

corporation since he does not act as a representative. A further criterion of attribution is therefore required and this is where the term 'organised irresponsibility' or organisational fault is employed. According to this, the corporation is liable for a criminal offence of one of its employees if this offence was facilitated because a decision-maker failed to take the measures intended to counteract such offences that are typically linked to the operational business: if the commission of the offence was made possible or facilitated because decision-makers did not take the requisite and reasonable care required by the circumstances, in particular by failing to take essential technical, organisational or personal measures to prevent such offences' (Z 2)

It is an important characteristic of the Austrian VbVG that liability is always attributed to a corporation – the individual legal entity. This means that an offence can only be attributed to a particular company if it has been committed by a decision-maker or employee of this company. Liability for an entire corporate group – a concern – has not been provided for.

A decision-maker or employee of one company can take part in the criminal offence of a decision-maker or employee of another company, however – e.g. a subsidiary (abet or aid, § 12 StGB). In principle, participation by omission is also conceivable⁶, e.g. in the case of a parent company that has supervisory duties with regard to its subsidiary. The decision-maker who has taken on these responsibilities, but does not act to prevent criminal offences within the subsidiary (which are known to him) may be liable as an accomplice by omission – and this omission might be attributed to his company, i.e. the parent company. Supervisory duties between individual group companies have not been clearly defined, as has been mentioned above; sometimes they are simply claimed to exist⁷; their derivation from company and corporate law is certainly difficult.⁸

b) *Procedural Law governing criminal prosecution & Actors (Prosecution and other authorities, victims, NGOs, courts)*

§ 14 VbVG explicitly refers to the Austrian Procedural Code (StPO), but limits its applicability: rules which are explicitly meant for natural persons cannot be applied. The company is represented by its decision-makers. These are therefore charged with the offence – as well as the employees who are accused of committing the offence or have already been found guilty (§ 17/1 VbVG).

The VbVG even provides for a conviction *in absentia*. In accordance with § 23, the court may conduct the trial and pass a judgment in absentia if the corporation is not represented at the trial although the summons has been duly served.

⁶ Marianne Hilf, Fritz Zeder, '§ 1 VbVG' in *Wiener Kommentar StGB* (Manz) No. 30.

⁷ *ibid.*

⁸ Cf. Ingeborg Zerbes, 'Individuelle Geschäftsherrenhaftung für Auslandstaten', in Peter Lewisch (ed) [2015] *Jahrbuch Wirtschaftsstrafrecht und Organverantwortlichkeit* 15 ff.

2.1.2 Principles of Jurisdiction /Building the nexus

As is universal practice, the core principle of Austrian criminal law is the territoriality principle: according to § 62 StGB, the Austrian criminal code is applicable ‘for all offences committed within the country’. A universal approach is adopted, however, with the broad definition of the place of the crime. The offence has been ‘committed’ in Austria, if the offender acted or should have acted – with regard to crimes of omission – in Austria, but also if the act had effects in Austria (‘ein dem Tatbild entsprechender Erfolg ganz oder zum Teil [in Österreich] eingetreten ist’); in the case of a mere attempt this includes effects intended to occur in Austria. With this connection to the effects of a criminal offence, the principle of territoriality already includes ‘transnational crimes’.

The territoriality principle is complemented by selective jurisdiction for offences committed abroad (neither the place where the offence was committed nor the place where the offence had effects are situated in Austria): for one thing, the principle of passive personality relates to the Austrian nationality of the victim and is applicable regardless of whether the offence is punishable under the laws of the foreign place of the crime. In accordance with § 64 StGB, however, this is only applicable for selected serious crimes, e.g. genital mutilation (§ 90 para 3 StGB), kidnapping for ransom (§ 102 StGB), certain serious crimes against sexual self-determination, torture (§ 312a StGB), genocide, crimes against humanity and war crimes (§§ 321 ff StGB).

For another, irrespective of the nationality of the victim, the principle of protection applies in Austria; certain criminal offences against specific high-ranking Austrian interests are prosecuted in Austria, regardless of where, by whom and against whom they have been committed in the actual case (e.g. malpractice of Austrian officials; also provided for by § 64 StGB) and, also, regardless of whether the act is liable to prosecution at the place of the crime, as is typical for this approach.

The principle of active personality, criminal liability based on Austrian nationality or habitual residence of the offender in Austria, is then established through two different approaches. According to the first approach, liability is established independently of the criminal law of the country where the offence was committed (§ 64 StGB), this only applies to selective cases, e.g. corruption (§§ 302 StGB). The other approach, a general rule in accordance with § 65 StGB, combines the principle of active personality with the principle of vicarious administration of justice and, correspondingly, an identical provision at the place of the crime is a prerequisite: ‘as far as the offence is also punishable under the law of the place of the crime’ (§ 65 para 1 Z 1).

Vicarious jurisdiction also occurs in its pure form: if the offender was a foreign national at the time of his offence committed abroad, but has been detained in Austria. The offence would not be prosecuted in Austria in such cases – the surrender of the offender to the competent foreign authorities – most probably of the country where the offence was committed – would generally be provided for under these circumstances. If this should

prove impossible “for another reason than the quality of his offence” – e.g. impediments to extradition as for example the threat of political persecution – Austria will prosecute the offence, acting in place of the foreign state to which the offender is not extradited.

The principle of universal jurisdiction is generally based on obligations of international law: certain serious offences against legal interests protected by the majority of the international community are prosecuted in Austria regardless of by whom and where they have been committed. Aircraft hijacking is one example of such crimes (§ 64 para. 1 Z 5 StGB).

Lastly, a general clause – § 64 para 1 Z 6 StGB – extends Austrian jurisdiction. It is provided for all criminal offences committed abroad, which Austria is under an **international** obligation to prosecute regardless of the law of the country where the offence was committed (§ 64 Abs 1 Z 6 StGB). This does not only cover all obligations existing at the time the provision was introduced⁹, but also all future obligations. The clause is thus a blanket provision: its content is determined by the respective international law.¹⁰ Some requirements of international law are already provided for by specific rules of jurisdiction; in such cases recourse to Z 6 of § 64 para. 1 will not be necessary.

CCR is subject to the general criminal laws, § 12/1 VbVG, and thus also the laws on jurisdiction outlined above in a nutshell. Jurisdiction is triggered by the underlying offence of an individual and not by the lack of organisation. This is not explicitly prescribed but undisputed.

With reference to the principle of territoriality (§§ 62, 67 StGB) this means that the offence of the decision-maker (§ 3/2 VbVG) or the employee (§ 3/3 VbVG) must have been committed on national territory.¹¹ The place of the organisational fault which made the offence of the employee possible or facilitated it is immaterial.¹² This entails a certain regulatory gap: if e.g. a decision-maker of an Austrian company violates his supervisory responsibility, thus facilitating or even promoting the criminal offence of an employee abroad, Austria would not have the jurisdiction to prosecute the company.

A corporation is also responsible under Austrian law if Austrian jurisdiction is established by the offence of the decision-maker or the employee in accordance with other principles (§ 64).¹³ With one exception: if jurisdiction (according to the relevant paragraphs of § 64 or § 65 StGB) is established through the **principle of active personality**, it is determined by the

⁹ With further references Farsam Salimi, ‘§ 67’ in *Wiener Kommentar StGB* (Manz) No. 85.

¹⁰ Farsam Salimi, ‘§ 67’ in *Wiener Kommentar StGB* (Manz) No. 85.

¹¹ Heidemarie Paulitsch, ‘Verbandsverantwortlichkeit ausländischer Gesellschaftsformen nach dem VbVG’ [2010] *ecolex* 469; Marianne Hilf/Fritz Zeder, ‘§ 12 VbVG’ in *Wiener Kommentar StGB* (Manz) No. 12; Klaus Schwaighofer, ‘§ 62’ *Salzburger Kommentar StGB* No. 15; Farsam Salimi, ‘§ 628’ in *Wiener Kommentar StGB* (Manz) No. 8.

¹² Marianne Hilf, Fritz Zeder, ‘§ 12 VbVG’, in *Wiener Kommentar StGB* (Manz) No. 10; similarly the EBRV on VbVG 994 BlgNR 22. GP § 12.

¹³ Marianne Hilf, Fritz Zeder, ‘§ 12 VbVG’ in *Wiener Kommentar StGB* (Manz) No. 9; Farsam Salimi, ‘§ 64’ in *Wiener Kommentar StGB* (Manz) No. 4.

place of the corporation or the **place of operation** or the **branch office** in Austria. The place of residence or nationality of the decision-maker or employee who committed the offence is irrelevant.

2.1.3 *Defining jurisdiction*

The distinction between ‘jurisdiction to prescribe’ and ‘jurisdiction to adjudicate’ is not used by Austrian criminal law doctrine. The criminal jurisdiction of Austria is defined as the ‘scope of application’ of Austrian criminal law (§§ 62 to 65a StGB) and this includes both:

- first, the Austrian law enforcement authorities (criminal police, public prosecution and court) investigate criminal offences; this constitutes adjudicative jurisdiction
- second, other than in the case of civil law, the Austrian authorities always apply Austrian criminal law; this could be termed prescriptive jurisdiction

2.1.4 *International Law and Human rights framework*

International Humanitarian Law (in a broad sense)

Austria contributes as a member of the Hague Agreements (I, II and III), the Declaration of the First Hague Conference 1899 and the Agreements (I-XI und XIII) of the Second Hague Conference 1907 (especially the Convention respecting the Laws and Customs of War on Land and the annexed Regulations Respecting the Laws and Customs of War on Land)¹⁴, the Geneva Conventions 1949 (I, II, III, IV) and their Additional Protocols of 1977.¹⁵ The Rome Statute of the International Criminal Court was signed in 1998 and transformed into national law in 2002.¹⁶

Austria is also a state party of the UN Convention on the Prevention and Punishment of the Crime of Genocide 1948¹⁷, of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984¹⁸ and the International Convention for the Protection of All Persons from Enforced Disappearance of 2006.¹⁹

With the exception of genocide (321 StGB), the severe crimes covered by these Conventions – crimes against humanity, all kinds of war crimes, torture, enforced disappearance – were only separately provided for in 2014; before this, it was argued that they were already covered by standard criminal law (murder, robbery, bodily injury etc).

¹⁴ These were transformed into national law together, RGBI 1913/173-188.

¹⁵ BGBl 1965/155 and BGBl 1982/527.

¹⁶ BGBl III 2002/180; Law on Cooperation with the ICC (‘Bundesgesetz über die Zusammenarbeit mit dem internationalen Strafgerichtshof’, transformed by BGBl I 2002/135).

¹⁷ BGBl 1958/91.

¹⁸ BGBl 1987/492.

¹⁹ BGBl III 2012/104.

International Law on drugs

Austria is a state party to all UN Conventions on drug control. The Convention on Psychotropic Substances of 1971 and the Drug Convention of 1988 were ratified in 1997²⁰ and led to a new Narcotic Substances Act in 1997 (BGBl I 1997/112). At regional level, Austria as EU Member State is bound by all EU Framework Decisions and Directives relating to the fight against drugs.

International (Criminal) Law on Organised Crime

As a participant of the UN Convention against transnational organized crime (2000), Austria has contributed to a reclassification and extension of offences covering membership in a dangerous group.²¹ As EU Member State and member of different Conventions of the Council of Europe, Austria has entered regional commitments for a criminal law minimum standard.

International (Criminal) Law on Terror

With regard to international treaties against terrorism, in particular the UN Convention for the Suppression of the Financing of Terrorism 1999²², the resolution of the UN Security Council 1373 (2001) and the Framework Decisions of the Council of the EU on Combating Terrorism (2002 und 2008) have influenced Austrian criminal law, and also the Convention of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005).

International Law on Economic Crimes

One of the most important issues of international economic regulation is corruption. At unilateral level, Austria is a member of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) and the UN Convention against Corruption (2003). At regional level, Austria is committed to all Conventions, Framework Decisions and Directives of the EU and, not least, to the instruments of the Council of Europe, which also adopted a Criminal Law Convention on Corruption (1999) as well as an Additional Protocol (2003).²³ The international legal framework has triggered several reforms of Austrian criminal law, considerably extending anti-corruption criminal law provisions with regard to transnational corruption as well as corruption at national level.²⁴

²⁰ BGBl III 1997/154.

²¹ BGBl I 2002/134.

²² BGBl III 2002/102, 103.

²³ ETS 173 and 191.

²⁴ BGBl I 1998/153, BGBl I 2007/109, BGBl I 2009/98, BGBl I 2012/61.

As a result of the Cybercrime-Convention of the Council of Europe (2001)²⁵ and the EU Directive on Cyber Attacks (2013), a number of computer-related offences were established.²⁶

The repeatedly reformed offence of money laundering in Austrian law is mainly based on the legal framework of the EU (the four existing directives), the Conventions of the Council of Europe on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990 and on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.²⁷

2.1.5 *Framework for Prosecuting a Cross-Border Case*

A cross-border case is generally assessed and decided according to the same rules that apply to national cases; however, it usually involves a request for judicial assistance – the extradition of the suspect or evidence obtained abroad.

The conviction of natural persons in absentia is only possible under very restricted circumstances; with regard to corporations, there is a broader rule in VbVG (§ 23), see above (B.I.1.b).

2.1.6 *Prominent cases and media coverage*

Realistically speaking, it can be said that the responsibility of corporations established in Austria in 2006 has not yet been implemented into everyday practice. As will be shown below (B.I.6), there have only been a few cases – although the trend is rising – and most of these have not resulted in convictions. There have not been any cases leading to a public debate, least of all with reference to violations of international law abroad. The *Danzer Case* is mentioned now and then in academic literature²⁸, but it does not bear any actual reference to Austria.

Media debates still focus on individual persons and their criminal offences. An exception is the company which applied to the VfGH and requested a constitutionality review of the VbVG, however, this does not relate to an international crime either.

2.1.7 *Statistics*

Neither police crime statistics nor court statistics list convictions under VbVG.

²⁵ CyCC, ETS 185, BGBl III 2012/140

²⁶ BGBl I 2002/134, BGBl I 2004/15, BGBl I 2007/109.

²⁷ ETS 141 and ETS 198.

²⁸ Claudia Müller-Hoff, Thomas M. Schmidt, 'Strafanzeige gegen Nestlé. Ein Präzedenzfall für menschenrechtliche Haftung von Unternehmen?' [2012] Juridikum 261 ff; Ingeborg Zerbes; 'Individuelle Geschäftsherrenhaftung für Auslandstaten', in Peter Lewisch (ed.), [2015] *Jahrbuch Wirtschaftsstrafrecht und Organverantwortlichkeit* 9 ff.

However, some data have been published in a survey of the Institute for the Sociology of Law and Criminology.²⁹ During the investigation period 2006 to 2010, about 350 proceedings were instituted against legal entities, with the number of proceedings increasing year by year. Most proceedings were terminated, however. There were eight convictions in 2014 and eleven in 2015.

The offences leading to prosecution under VbVG have become more diverse over time. The offences most frequently prosecuted are offences against property (fraud and breach of trust), tax and competition offences, but also personal injury and homicide, environmental offences, document fraud and bribery.

2.1.8 *Public debate on Corporate Social Responsibility?*

The adoption of the VbVG was very controversial and preceded by about ten years of debate.³⁰ In particular, the critics considered the attribution of crimes committed by natural persons to legal entities to be incompatible with the principle of fault.³¹ For a long time, the VbVG was only invoked in a very limited number of cases, and there were hardly any convictions, or to put it more drastically: “For years, corporate social cooperate criminal liability was de facto of no importance.”³²

However, this changed in 2015/16. There are still few convictions – but the number of cases that have been prosecuted has significantly increased and the debate on constitutional problems has received new impetus. A corporation has initiated proceedings for a review of constitutionality by the VfGH³³; a decision is expected in September 2016.³⁴

To sum up, the VbVG is called into question in its substance at present in Austria – it has to prove to be constitutional. The question we are concerned with here – whether its

²⁹ Walter Fuchs, Reinhard Kreissl, Arno Pilgram, Wolfgang Stangl, ‘Generalpräventive Wirksamkeit, Praxis und Anwendungsprobleme des Verbandsverantwortlichkeitsgesetzes (VbVG), Eine Evaluierungsstudie’, [2011] Institut für Rechts- und Kriminalsoziologie Wien (irks.at/assets/irks/Publikationen/Forschungsbericht/irks_vbvz_bericht.pdf; last accessed 08_1016).

³⁰ Cf. Walter Fuchs, ‘Die Normgenese des Unternehmensstrafrechts – Eine Fallstudie anhand des österreichischen Verbandsverantwortlichkeitsgesetzes (VbVG) [2013] Zeitschrift für Rechtssoziologie 51.

³¹ Peter Lewisch, Jeffrey Parker, *Strafbarkeit der juristischen Person*, (Manz 2001) 147 ff; BKA-Verfassungsdienst, 318.071/001-II.2/2004 of 14.06.2004. Comprehensive constitutional critique – following adoption of the law – by Peter Lewisch, ‘Verbandsverantwortlichkeit’, in Studiengesellschaft für Wirtschaft und Recht (ed.), *Wirtschaftsstrafrecht*, 2008, 207 as well as Peter Lewisch, ‘Verbandsverantwortlichkeitsgesetz aus strafrechtlicher und insolvenzrechtlicher Sicht’, in Andreas Konecny (ed), *Insolvenz-Forum* (NWV 2006) 79; Reinhard Moos, Die Strafbarkeit juristischer Personen und der Schuldgrundsatz [2004] RZ 98.

³² Peter Lewisch, ‘Verbandsverantwortlichkeit und Verfassungsrecht’, in Peter Lewisch (ed.), [2016] *Jahrbuch Wirtschaftsstrafrecht und Organverantwortlichkeit* 39 ff.

³³ G-497/2015.

³⁴ For further particulars cf. Peter Lewisch, ‘Verbandsverantwortlichkeit und Verfassungsrecht’, in Peter Lewisch (ed) [2016] *Jahrbuch Wirtschaftsstrafrecht und Organverantwortlichkeit* 39 ff.

applicability to offences committed abroad (key word CSR) does not extend far enough – points into another direction altogether and is currently suppressed.

However, the discussion cannot altogether bypass Austria. The issue of liability of the principal under criminal law ('Geschäftsherrenhaftung') has been taken up recently and applied to cross-border cases.³⁵ In the Swiss case Nestlé, the potential responsibility of a resident company for violations of human rights involving a subsidiary abroad was strongly advocated.³⁶

3 Holding Corporations Accountable – the Jurisdictional Issue

3.1 General Aspects of Jurisdiction

3.1.1 General

The rules of jurisdiction of Austrian criminal law cannot be summarised by a certain doctrine – they are based on various considerations arising from diverse historical international developments (cf. below for the individual principles). They are rooted in the sovereignty of states established in Europe since the 15th/16th century. The principle of territoriality – insofar the universally recognised 'primal principle' of domestic jurisdiction – is the strongest expression of this, based on the simple concept that a state governs its territory and therefore investigates and prosecutes (under criminal law) the crimes committed within this territory.³⁷

The other principles (also) have different backgrounds. The origin of the active personality principle can be traced to an absolutist understanding of the state – and is certainly criticised from this perspective³⁸ –, but is also seen as a move towards solidarity with the foreign state where the crime was committed today.³⁹ The passive personality principle and the protective principle can (also) be seen as an expression of distrust. Austrian jurisdiction is to ensure that the Austrian victim or the Austrian interests that have been violated are appropriately considered.

The delegation of criminal prosecution can also imply solidarity. Austria takes over the prosecution which cannot be carried out by the state primarily concerned. This implies that extradition is impossible; insofar, a lack of trust in the prosecution of crimes in the affected state can play a role, too.

The universality principle expresses Austria's participation in the (criminal law) protection of universally recognised objects of legal protection of the highest order. Mostly, this is based

³⁵ Ingeborg Zerbes, 'Individuelle Geschäftsherrenhaftung für Auslandstaten', in: Peter Lewisch (ed) [2015] *Jahrbuch Wirtschaftsstrafrecht und Organverantwortlichkeit* 9.

³⁶ Claudia Müller-Hoff, Thomas M. Schmidt, 'Strafanzeige gegen Nestlé. Ein Präzedenzfall für menschenrechtliche Haftung von Unternehmen?' [2012] *Juridicum* 261.

³⁷ Cf. Mark Pieth, *Wirtschaftsstrafrecht* (Helbing & Lichtenhahn 2016) 23.

³⁸ Dietrich Oehler, *Internationales Strafrecht* (2nd edn., Heymann) No. 139 f.

³⁹ Farsam Salimi, 'Vorbemerkungen zu §§ 62 – 67', in *Wiener Kommentar StGB* (Manz) No. 11.

on international agreements. Generally, it can be said that rules of jurisdiction deriving from Austria's international commitments are based on motives of international cooperation and solidarity.⁴⁰

3.1.2 Territorial Jurisdiction

The territoriality principle is the most important principle of jurisdiction (also) in Austria. As has been stated above (1. above), it is inseparable – also with respect to its history – from the **sovereignty** over the territory of the state. The offence committed on Austrian territory is to be judged in accordance with Austrian criminal law.

In procedural terms, the sovereignty of the state requires that only the domestic authorities can investigate within the territory of the state – and since the evidence for crimes committed in Austria is as a rule located in Austria, territorial jurisdiction is also the **most efficient** form of jurisdiction.⁴¹

Legal Framework

The principle of territoriality is provided for by § 62 StGB:

Criminal offences on domestic territory

§ 62. Austrian criminal provisions are applicable for all offences committed on domestic territory.

This is further specified by § 67, which provides a broad legal definition of the place of the offence:

Time and place of the offence

§ 67 (1) ...

(2) An offence has been committed in every location in which the offender has engaged or ought to have engaged in the prescribed conduct or the location in which a result element of the offence, in whole or partially, occurred or in belief of the person should have occurred.⁴²

In Austria, the place of the offence is either linked to the place where the offender acted (alternative 1 and 2) or the place where the crime had its effect (alternative 3 and 4). Austria can thus claim extraterritorial jurisdiction if the offender acted or failed to act in another country (and would regularly come under the jurisdiction of this country), but the act had or should have had its effects in Austria.

⁴⁰ Cf. on these international historical backgrounds, which have also influenced Austrian rules of jurisdiction, Mark Pieth, 'Art. 3', in Mark Pieth, Nicola Bonucci, Lucinda A. Low (eds.), *The OECD Convention on Bribery: a Commentary*, (2nd edn, Oxford University Press 2015) 60.

⁴¹ Farsam Salimi, 'Vorbemerkungen zu §§ 62 – 67' in *Wiener Kommentar StGB* (Manz) No. 7.

⁴² Translated from German by Andreas Schloenhardt, *Strafgesetzbuch – Austrian Criminal Code* (NWV 2016).

If Austria is only used as a place of transit because although the territory was entered, the offender did not act and the offence did not have its effect in Austria, this constitutes a so-called transit crime. In such cases Austria has no jurisdiction in accordance with §§ 62, 67.⁴³

The typical circumstances under which an Austrian company will be responsible for an offence committed abroad will involve a parent company and its subsidiary. The criminal offences are primarily committed abroad, by the foreign subsidiary, and it has to be decided whether a decision-maker of the parent company in Austria participated in the offence by aiding or abetting.

If the answer is yes, the question of Austria's jurisdiction has to be decided, which is a controversial issue since domestic participation in a criminal offence committed abroad has not been explicitly regulated. This may be resolved by resorting to § 67 StGB which determines the place of the crime: 'An act giving rise to criminal proceedings is committed by the offender at every place where he acts or should have acted.' Since persons who aid or abet in the commission of a crime are also 'offenders' according to § 12 StGB, the place of the crime – in this case: at the parent company in Austria – can be located on domestic territory.⁴⁴ Whether the immediate perpetrator is prosecuted at the place where the (immediate) offence took place, is therefore irrelevant.

A different interpretation is possible on the basis of § 64 StGB, providing for the applicability of Austrian criminal law for criminal offences committed abroad. All cases of jurisdiction independent from the criminal law of the foreign state might be conclusively regulated by this provision. With respect to cross-border participation, § 64 StGB only provides for cases where participation is located abroad and the actual offence was committed on domestic territory (§ 65 Z 8 StGB). With regard to the scenario we are concerned with here and which is not provided for, participation on domestic territory in an offence committed abroad, one might deduce that the law of the place where the crime was committed is relevant, and that participation (aiding or abetting) in Austria can only be prosecuted if the offence is punishable in the country where it was committed.

Practice

The broad definition of the place of the offence of § 67/StGB allows for the 'conduct doctrine' and the 'effects doctrine' in Austria; both principles are therefore applied. An objective approach is taken.

⁴³ Helmut Fuchs, *Strafrecht, Allgemeiner Teil I* (9th edn. Verlag Österreich 2016) Chapter 5 No. 23.

⁴⁴ Farsam Salimi, '§ 67' in *Wiener Kommentar StGB* (Manz) No. 38.

A broad approach is applied to the concept of territoriality: it is sufficient if a part of the criminal offence takes place in Austria, irrespective of whether it is the first or a later act of the offence and irrespective of its relevance for the overall event (*'Teilaktstheorie'*).⁴⁵

According to the provision, the place of the results of the offence is connected to the definition of the offence itself (§ 67/2 Alternative 3 und 4 StGB: *'ein dem Tatbild entsprechender Erfolg'*). So-called result crimes (*'Erfolgsdelikte'*) are therefore clearly defined: There are characterised by an event in the outside world, separate from the act of the crime – the result – that is required for the completion of the offence: In other words: the *'act of the offender and the effects of this act [are] separable'*.⁴⁶ This applies in the case of homicide, offences against property requiring the occurrence of damage, offences against physical integrity, but also concrete endangerment offences, e.g. certain environmental crimes, and even offences where the act of making public or giving access to expressions, pictures etc. is liable to prosecution.⁴⁷ They come under Austrian jurisdiction even if the offender acted abroad, but the effects of his act – the death of a person, the financial damage, the personal injury, the danger, the disclosure of texts or pictures etc. – occurred in Austria⁴⁸ or were intended to have occurred in Austria.⁴⁹

This is different in the case of simple conduct crimes (*'schlichte Tätigkeitsdelikte'*), where the above-described separation of the act and its effects is not required and the territoriality principle refers exclusively to the place of the crime (§ 67/ alternative 1 and 2 StGB).⁵⁰ Concepts of extension, mainly proposed by German doctrine, classifying simple conduct crimes, where the offender acted abroad, as offences committed on domestic territory, have not been able to assert themselves in Austria so far.⁵¹

In the context of entrepreneurial activity – and thus the criminal responsibility of an enterprise – the broad understanding of the place of the crime could certainly play a role in Austria. It is conceivable, for example, that the decision-maker of a foreign company, from a location abroad, organises the import of a product into Austria which causes an injury to a customer in Austria. In theory, the foreign company would be liable to prosecution under VbVG in this case – even if a legal entity is not liable for criminal offences in the respective foreign country. The problems arising from such a constellation have so far only been discussed theoretically, if at all.

⁴⁵ OGH: 12 Os 111/06z; 12 Os 120/91; 10 Os 16/69; EvBl 1969/245; 13 Os 29/72, JBl 1972, 623; for many: Dietrich Oehler, *Internationales Strafrecht* (2nd edn., Heymann 1983) No. 241; Verena Murschetz, *Auslieferung und Europäischer Haftbefehl* (Springer 2007) 46.

⁴⁶ Farsam Salimi, '§ 67' in *Wiener Kommentar StGB* (Manz) 49.

⁴⁷ Farsam Salimi, '§ 67' in *Wiener Kommentar StGB* (Manz) No. 50 ff. analyses in detail the individual offences with regard to the requirement of such effects.

⁴⁸ Whether the offender intended the effects to occur in Austria is irrelevant, see e.g. OGH 12 Os 11/81.

⁴⁹ OGH: 13 Os 104/01, EvBl 2002/127; 12 Os 11/81, SSt 52/13).

⁵⁰ 13 Os 4/13g, JBl 2014, 401 (in a case of trafficking); 14 Os 160/09z, EvBl 2010/83 (Kriminelle Vereinigung).

⁵¹ For an extensive analysis cf. Farsam Salimi, '§ 67', in *Wiener Kommentar StGB* (Manz) No. 44 ff.

3.1.3 Extraterritorial Jurisdiction

The Austrian criminal justice system does not have a general presumption against extra-territorial jurisdiction. However, a place of crime located in Austria (as defined by § 67 StGB) is the main and universally applicable cause of criminal prosecution in Austria. All other principles – personality, vicarious jurisdiction, universal jurisdiction are only applicable to certain offences (§ 64 StGB) or with the restriction that the relevant crime is also liable to prosecution in the state where it took place and that the offender cannot be extradited (§ 65/1 StGB).

On the interests behind the individual principles see 1.

Active Personality and Nationality Principle

– Generals

The Active Personality Principle is recognised by Austria in two different contexts. First, in accordance with § 64 StGB for selected offences and irrespective of whether the offence is also liable to prosecution in the foreign country where it took place (principle of ‘identical rule’):

Offences committed abroad that are prosecuted regardless of the law of the place of the crime

§ 64. (1) Austrian criminal law is applicable regardless of the criminal law of the place of the crime for the following offences committed abroad ...

This is followed by a list of offences that will be prosecuted by Austria if the offender is an Austrian (§ 64/1 Z 4a, 4b and 4c StGB): among others, corruption and other malpractice (§§ 302 bis 309 StGB), genital mutilation (§ 90/3 StGB), kidnapping for ransom (§ 102 StGB), surrender to a foreign power (§ 103 StGB), slavery (§ 104 StGB), trafficking in human beings (§ 104a StGB), grave coercion (§ 106 Abs. 1 Z 3 StGB) including forced marriage (§ 106a StGB), rape (§ 201 StGB), several other crimes against sexual integrity, cross-border prostitution trade, production and distribution of weapons of mass destruction (§ 177a StGB), torture (§ 312a StGB), forced disappearance of a person (§ 312b StGB) and all core crimes – genocide, crimes against humanity, war crimes and the crime of aggression (§§ 321 ff StGB). Sometimes the active personality principle is extended to offenders who have their habitual residence in Austria (so-called domicile principle).

It is apparent from the range of these offences that the main rationale today is solidarity with the affected state. An Austrian citizen or a resident who travels abroad and commits such offences in a foreign country is not to go unpunished in Austria – Austria does not extradite its citizens as a matter of principle; this principle has applied without restriction for a long time, meanwhile there are exceptions under certain circumstances, but only for extradition to another EU member state. The fact that the offence does not have to be liable to

prosecution in the affected state shows that the respective objects of legal protection are considered to be of ubiquitous importance.

The second group of cases where the active personality principle is applied is defined in more general terms by § 65 StGB – which does not simply list individual offences –, however, Austria's jurisdiction depends on there being an identical rule in the affected state.

Offences committed abroad that are only prosecuted if they are liable to prosecution under the law of the place of the crime

§ 65. (1) For other ... offences committed abroad, Austrian criminal law is applicable if the offences are also liable to prosecution under the law of the place of the crime:

1. if the offender was Austrian at the time the offence was committed or if he acquired Austrian citizenship at a later date and is still an Austrian citizen at time proceedings are initiated;
2. ...

The active personality principle is thus combined with the principle of vicarious jurisdiction (see below C.I.3.e), as its application depends on the violating effect of the offence in the affected state and thus the latter's interest in prosecution. Austria cannot comply with this as Austrian citizens are protected from extradition, but will prosecute the offender in accordance with the principle of '*aut dedere aut judicare*'.

– Corporations and the Active Personality Principle

§ 12 VbVG 'translates' the active personality principle for the prosecution of corporations:

Application of general criminal law

(1) ...

(2) If, according to the provisions, the applicability of Austrian criminal law for offences committed abroad depends on the residence of the offender in Austria or his Austrian citizenship, the decisive criterion for corporations is the registered office of the corporation or the place of business or the place of establishment.

For all provisions that base Austrian jurisdiction on the person of the offender (the respective clauses of § 64/1 and § 65/1 Z 1 StGB), the person of the decision-maker or employee whose offence leads to the responsibility of the corporation is irrelevant – he may be Austrian or a foreigner, only the place of registration matters.

Passive Personality Principle

– Generals

The passive personality principle is provided for under § 64/1 StGB: **without the requirement that the respective offence is liable to prosecution at the place of the crime and only for selected offences**

§ 64. (1) Austrian criminal law is applicable regardless of the criminal law of the place of the crime for the following offences committed abroad ...

For the most part, this concept then applies the passive personality principle to the offences that are also prosecuted under the active personality principle, e.g. genital mutilation, severe sexual offences, torture and core crimes (see above with respect to the active personality principle, C.I. 3.a)aa.), though not to the production and distribution of weapons of mass destruction (§ 64/1 Z 4a und 4c StGB). The connection to the victim is partly interpreted as domicile principle, too.

– Corporations and the passive personality principle

The VbVG provides for the application of general criminal law where corporations are to be held liable, § 12/1, only for the active personality principle, the special provision of § 12/2 applies (see above C.I 3.a)bb). With regard to the passive personality principle, this means that corporations may be liable under Austrian law, if the offence of the decision-maker or the employee (§ 3/2 and 3 VbVG) fulfils the corresponding requirements (of § 64/1 Z 4a and 4c) and the victim is Austrian. The restriction of § 3/1 VbVG has to be observed, though: the corporation must be the beneficiary of the offence (Z 1) or must have neglected its duties (Z 2). In the context of the offences listed by § 64/1 under the regime of the passive personality principle this is rather unlikely.

Protective Principle

– Generals

The protective principle is applied, like the active and passive personality principle, under § 64 StGB, and is thus – like the personal principle – **independent of the criminal law of the place of the crime.**

It is, however, only applicable for selected offences: offences which would have very serious effects for Austria, e.g. high treason committed abroad according to § 64/1 Z 1, crimes against the highest state authorities and espionage against Austria (§§ 252 ff), false statements in Austrian courts that are made abroad (by way of legal assistance), Criminal violations of official duties, corruption, and related offences (§§ 302 bis 309 StGB) for the benefit of an Austrian official.

Severe offences against individual objects of legal protection, as for example genital mutilation, severe sexual offences, torture, core crimes, for which the active as well as the passive personality principle are provided, are also prosecuted under the protective principle ('other Austrian interests have been violated by the offence', § 64/1 Z 4a lit. b).

– Corporations and the Passive Protective Principle

It is conceivable that a decision-maker or an employee of a company abroad commits a criminal offence that comes under Austrian jurisdiction based on the protection of Austrian

interests under § 64/1. Theoretically, the company concerned might then also be liable for the offence in Austria. In practice, such cases are not very likely to occur, though, since the company would have to benefit from the offence or violate its duties. This will hardly be the case for offences to which the protective principle is applied in Austria.

There is, however, a special provision for jurisdiction in the Foreign Trade Act, which imposes certain restrictions – e.g. the requirement of authorisations – for particularly sensitive areas of trade. Embargoes against certain states are implemented in this way too. Some violations are punishable and these may be prosecuted under Austrian jurisdiction if ‘the offence was committed for the benefit of a legal person ...based in Austria’ (§ 83/3 Außenwirtschaftsgesetz). This would fulfil the requirement of § 3/1 Z 1 VbVG, the benefitting company might thus be generally liable for the offence of a decision-maker or an employee.

Jurisdiction over Military Personnel

No special provision for soldiers.

Vicarious Jurisdiction – Stellvertretende Strafrechtspflege

In accordance with § 65/1 Z 2 StGB, the Austrian authorities prosecute offenders acting for the actually competent state (the state where the crime was committed), provided that the suspect cannot be extradited for certain reasons.

Criminal offences committed abroad which are only prosecuted if also punishable in accordance with the law of the place of the crime

§ 65. (1) For other ... offences [other than those listed under § 64], which have been committed abroad, Austrian criminal law applies provided that the offences are also punishable under the law of the place of the crime:

1. ...

2. if the offender was a foreigner at the time of the offence, was caught on domestic territory and may not be extradited for another reason than the nature of his offence.

This provision is based, to put it in simple terms, on the principle of ‘aut dedere aut judicare’. If a foreigner is arrested in Austria, who is accused of a crime committed abroad without any reference to Austria in accordance with § 64 StGB, Austria has no interest in prosecution and will generally extradite the suspect to the state that has such an interest – this may be the state where the crime took place, the country of origin of the person concerned or the victim. If extradition is not possible, e.g. because the suspect is threatened with persecution contrary to the rules of law or there is another impediment to extradition, Austria has to take over the prosecution, acting for the other state in accordance with § 65/1 Z 2 StGB. Since it is the interest of a foreign state that is pursued, prosecution in Austria depends on the behaviour being incriminated in the respective state – otherwise there is no occasion for vicarious jurisdiction.

3.1.4 *Universal Jurisdiction*

Universal jurisdiction is applied in certain cases in Austria, usually against the background of international agreements in which the international community has expressed its interest in the global prosecutability of violations of objects of legal protection regardless of the place of the crime. In Austria, torture, the forced disappearance of a person, genocide, all crimes against humanity, all war crimes, the crime of aggression as well as aircraft hijacking and related crimes are prosecuted in accordance with the universal principle (§ 64/1 1 Z 4c und 5 StGB). If these cases bear no relation to Austria – whether in the person of the offender or the victim or because an Austrian interest has been violated – they will only fall under Austrian jurisdiction if the offender cannot be extradited.

In addition, there is a catch-all provision: Austria is responsible for the prosecution of all other offences committed abroad if it has an international obligation to prosecute such offences (§ 64/1 Z 6). In this context, it is irrelevant whether the offender can be extradited to the country where the crime took place.

3.1.5 *Other Sources of Jurisdiction*

None. With regard to the effects doctrine and its limitations see above (C.I.2.), there has been no debate regarding a broad interpretation for legal entities.

3.1.6 *Transitional Justice Mechanisms*

None.

3.2 Jurisdiction for Prosecuting Corporations under International Law (UN Law, multi-lateral treaties)

3.2.1 *General*

The jurisdiction of Austria for offences committed abroad is frequently based on international treaties. On the one hand, they are implemented by § 64/1 StGB, explicitly and irrespective of the law of the affected state; on the underlying principles cf. above (C.I.3.) – a common principle or overall objective cannot be established; further restrictions, e.g. seriousness of the offence concerned or evidence facilitating prosecution in Austria, are not provided for.

If an international obligation has not been implemented by an explicit rule establishing jurisdiction, Austria fulfils this obligation in accordance with the general clause of § 64/1 Z 6 StGB;

Criminal offences committed abroad that are prosecuted regardless of the law of the place of the crime

§ 64. (1) The Austrian Criminal Code applies regardless of the criminal law of the place of the crime for the following offences committed abroad:

...

6. other criminal offences [those which are *not* listed in one of the other subsections of § 64/1] Austria is obliged to prosecute, even if they have been committed abroad irrespective of the criminal law of the place of the crime;

...

It is therefore not required to amend § 64 StGB whenever an international agreement requires Austria to prosecute offences committed abroad: the Austrian prosecuting authorities fulfil this international obligation in accordance with § 64/1 Z 6.

3.2.2 *Jurisdictions Prescribed by International Humanitarian Law (Core Crimes)*

With the exception of genocide (§ 321 StGB), Austria only established special offences for core crimes – war crimes, crimes against humanity – as well as enforced disappearance of a person and torture, and provided for a corresponding extraterritorial jurisdiction (including genocide) (§ 64 Abs 1 Z 4c StGB)⁵² in 2012 and 2014. These are based on

- the Rome Statute of the International Criminal Court of 1998⁵³
- the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954⁵⁴,
- the International Convention for the Protection of All Persons from Enforced Disappearance of 2006⁵⁵
- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.⁵⁶

Other Conventions listed below (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, UN Single Convention on Narcotic Drugs of 1961, UN Convention for the Suppression of Terrorist Bombings of 1997, UN Convention for the Suppression of the Financing of Terrorism of 1999) relate to offences other than ‘core crimes’. They cannot be classified as humanitarian international law and are therefore not related to the above question. To summarize briefly, Austria has implemented the required jurisdiction obligations in § 64/1 – partly by an explicit enumeration of the respective offences, partly through the general clause of § 64/1 Z 6.

3.2.3 *Jurisdiction Based on Customary International Law*

None.

⁵² BGBl I 2014/106; previously only general offences like murder, personal injury etc. were provided for.

⁵³ Rome Statute of the International Criminal Court, in Austria: BGBl III 2002/180.

⁵⁴ BGBl III 2004/113.

⁵⁵ BGBl III 2012/104.

⁵⁶ BGBl 1987/492.

4 Overlapping Domestic Legal Frameworks and the Prosecution of Corporations

4.1 Conflicts of Jurisdiction

It is difficult to classify Austrian practice in these terms. Dominant claiming of jurisdiction against other competent states is certainly untypical, at least as far as extraterritorial jurisdiction is concerned.

4.2 Overlapping Domestic Jurisdictions

Criminal liability of a corporation under VbVG precludes neither civil law actions nor administrative proceedings against the same corporation; tort claims are even a typical by-product.

If however, besides criminal proceedings under VbVG, administrative proceedings are to be initiated which might be viewed as ‘criminal proceedings’ according to ECHR, the right not to be tried or punished twice (‘ne bis in idem’, Art. 4 of Protocol No. 7 of the ECHR) has to be taken into account. In such a case, a conviction or an acquittal in accordance with VbVG would exclude proceedings initiated by the administrative authorities concerned.

4.3 Conflicting International jurisdictions

Parallel jurisdictions are referred to within the legal framework of extradition and mutual legal assistance. § 60 of the Law on extradition and mutual legal assistance (*‘Auslieferungs- und Rechtshilfegesetz’, ARHG*) provides for the possibility of Austria being requested by another state to take over the prosecution of a crime; § 74 ARHG makes provision for the reverse situation, where Austria, though in principle responsible/competent, requests another state to take over the prosecution of a crime. Such a request can be made by Austria if the accused person does not reside in Austria and extradition is not requested; this case is irrelevant in the context of corporations. As an alternative, the request can be made based on considerations of expediency only. This alternative is also clearly provided for natural persons and not adapted to liability of corporations.

A concrete procedure is provided for the resolution of conflicts of jurisdiction involving other Member States of the EU: §§ 59a ff. of the Law on judicial cooperation in criminal proceedings with other Member States of the EU (*‘Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union’, EU-JZG*). Basically, this provides for ‘consultations’; Eurojust may be involved. These provisions do not refer to corporations.

5 Proposals for Reform of the Legal Framework of Jurisdiction

Due to its central geographical position and its neutral status Austria represents itself as ‘platform for international dialogue’, as ‘one of the most important headquarters of International Organizations (IO) emerging as a hub for the promotion of peace, security,

sustainable development, disarmament and non-proliferation of nuclear weapons. Further emphasis is given to fight against crime, drug abuse and terrorism.⁵⁷

In this context (too), a certain tendency can be observed to (also) deal with severe crimes, in particular violations of human rights, taking place (sometimes systematically) abroad, via the rules of jurisdiction. Examples for this are the amendments of the Criminal Code of 2012 and 2014. Specific offences have been established for torture, the enforced disappearance of a person, war crimes and crimes against humanity, and the provisions establishing Austrian jurisdiction were extended to cover these crimes (§ 64).⁵⁸

Such amendments should not be overrated, however, as they do not initiate a change of policy towards an active taking on of crimes committed abroad, but have a primarily symbolic meaning in Austria. This is reflected by the fact that the explicit offence of torture and Austrian jurisdiction for such crimes committed abroad was not introduced because of domestic endeavours but following pressure of the UN-Committee Against Torture.⁵⁹

6 Conclusion

The legal framework of corporate criminal responsibility of legal entities will have to assert itself in Austria first: the constitutionality of the VbVG was currently reviewed by the constitutional court (VfGH).⁶⁰ International legal policy movements demanding co-responsibility of corporations for crimes committed abroad, in particular violations of human rights, have therefore retreated into the background. Also, before the issue of extraterritorial jurisdiction is discussed in this context, the basic principles of liability in substantive criminal law have to be analysed: the supervisory duties in a company, and above all corporative structures, where crimes such as those discussed here usually take place. It is not only in Austria that these questions have not yet been addressed.

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⁵⁷ Official homepage of the Austrian Federal Ministry for Europe Integration and Foreign Affairs <<https://www.bmeia.gv.at/en/european-foreign-policy/international-organisations-in-austria>>.

⁵⁸ BGBl I 2012/120; BGBl I 2014/106. The offences explicitly listed here did not go unpunished before the amendments came into force, prior to this time they were covered by 'standard criminal provisions'.

⁵⁹ Explanatory remarks zu BGBl I 2012/120 (2003 BlgNR XXIV. GP).

⁶⁰ VfGH, 2 December 2016, G 497/2015-26, G 679/2015.

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