

AIDP-IAPL International Congress of Penal Law

CRIMINAL JUSTICE AND CORPORATE BUSINESS

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Due to the growing role of corporations in society, corporations have been increasingly in the centre of attention of criminal justice, both for acts committed by individuals in the corporate context as well as corporations becoming subject to criminal liability in their own capacity.¹

The branch of criminal law which deals with liability and offences committed in a corporate context is known in the tradition of civil law countries as economic criminal law (*droit pénal des affaires, derecho penal económico, Wirtschaftsstrafrecht*) and in common law countries it is usually referred to as white-collar crime. Each of these national terms has its own denotation and focus, and some of them may be specific for the legal system in question.² Although the exact scope of economic criminal law is debated, it is generally accepted that it is linked to the criminal enforcement and sanctioning of violations of regulations in the economic and financial sphere.

Traditionally corporate crime reflected concerns about 'corporate' risks, i.e. risks that are typically associated with the economic, environmental, or social impact of the modern (multinational) corporations, especially as expressed in international

¹ See for instance D. Stoitchkova, *Towards corporate liability in International Criminal Law* (Intersentia, 2010); M. Pieth and R. Ivory (eds.), *Corporate Criminal Liability - Emergence, Convergence and Risk* (Springer, 2011); S. Sun Beale, 'A response to the critics of corporate criminal liability' (2009) 46 *American Criminal Law Review* 1481; J. Gobert and M. Punch, *Rethinking corporate crime* (Cambridge, University Press, 2003); D. M. Amann, 'Capital punishment: corporate criminal liability for gross violations of human rights' (2001) *Hastings Int'l & Comparative Law Review* 327; V.S. Khanna, 'Corporate Criminal Liability: What purpose does it serve?' (1996) *Harvard Law Review* 1477; B. Fisse, 'Reconstructing Corporate Criminal Law: deterrence, retribution, fault and sanctions' (1983) 56 *South California Law Review* 1141; K.F. Brickey, 'Corporate criminal accountability: a brief history and an observation' (1982) *Washington University Law Quarterly* 393; J. C. Coffee Jr., "'No soul to damn, no body to kick": an unscandalized inquiry into the problem of corporate punishment' (1981) *Michigan Law Review* 386.

² For instance, the French concept *droit pénal des affaires* includes any type of offence that protects either the economy as a whole or particular financial interests of private or public victims, as well as all offences which take place in a corporate setting, including traditional property offences; see M. Delmas-Marty and G. Giudicelli-Delage, *Droit pénal des affaires* (2nd ed., Paris, PUF, 2000) 13. By comparison, the German notion *Wirtschaftsstrafrecht* refers to offences relating to the business activities and does not include traditional property offences; see K. Tiedemann, *Wirtschaftsstrafrecht. Einführung und Allgemeiner Teil mit wichtigen Rechtstexten* (3rd ed., Köln, Carl Heymanns Verlag, 2010) 6-9 and 16. The term white-collar crime, defined by SUTHERLAND (1949), is "a crime committed by a person of respectability and high social status in the course of his [or her] occupation"; see J. Braithwaite, 'Challenging Just Deserts: Punishing White-Collar Criminals' (1982) 73 *Journal of Criminal Law and Criminology* 723.

instruments. Meanwhile there is a growing recognition that corporations should be held liable for all crimes on the books.³ This approach takes into account that any offence can be committed within the corporation or for its interests. Corporation can be used as a vehicle to facilitate or commit various crimes. In this sense a corporation can be behind any crime, including manslaughter or crimes against humanity.

The topic of the XXth International Congress of Penal Law shall be understood according to this broader perspective. It will address not only the challenges stemming from the use of criminal law to regulate business activities, but will also look into the challenges and problems that corporations present for the criminal justice systems. The four sections of the Congress shall take into account the various aspects of criminal justice: general and special part of substantive criminal law, procedural law as well as issues linked to the administration of justice and international cooperation. They should analyse changes and tendencies regarding policies, norms and practices.

Within the broader theme of “Criminal justice and corporate business” the AIDP has identified four topics which are respectively representative for studying the challenges and tendencies in the various fields of criminal justice.

Section 1: Individual Liability for Business Involvement in International Crimes

Section 1 of the Congress shall focus on the general part of substantive criminal law and is devoted to “Individual liability for business involvement in international crimes”. Referring to complicity in the context of business and human rights has become commonplace in recent years. It refers, in general, to the fact that corporations and their officials can become involved in human rights abuses that may incur responsibility under international criminal law. Already the war crime tribunals set up after the Second World War prosecuted a number of businessmen for various forms of involvement in crimes of the Nazi.⁴ The complicity of civilians in the commission of international core crimes was also laid down in the Nuremberg principles, created by the International Law Commission of the United Nations to codify the legal principles underlying the Nuremberg Trials of Nazi party members following World War II.⁵

³ See M. Pieth and R. Ivory, ‘Corporate Criminal Liability’ in K.B. Brown and D.V. Snyder, *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l’Académie Internationale de Droit Comparé* (Springer, 2012) 625.

⁴ Flick, Tesch, Krupp, IG Farben or the Zyklon B case are the well-known historic precedents. See F. Jessberger and J. Geneuss, ‘Introduction’ (2010) 8 *Journal of International Criminal Justice* 695.

⁵ See the VII Principle of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted by the International Law Commission of the United Nations in 1950. In literature, see D. Stoitchova, *op. cit.* 53; G. Werle and F. Jessberger, *Principles of International Criminal Law. Third Edition* (Oxford University Press, 2014) 194; K.J. Heller, *The Nuremberg Military Tribunals and the origins of International Criminal Law* (Oxford University Press, 2011) 252.

However, the modern day relevance of this early jurisprudence is often overlooked.⁶ Indeed, a wide variety of companies from all sectors – natural resource extracting companies, infrastructure and engineering industry, financiers,⁷ retail business, transport⁸ and communication – have a global presence and operate in countries where armed conflicts are on-going or where gross human rights violations amounting to international crimes are committed.⁹ Domestic and international efforts to hold perpetrators of international crimes accountable have become increasingly successful over the past decades. The prosecution and punishment of their business accomplices, however, have remained rare exceptions.¹⁰ Section 1 of the Congress programme will address this issue and study the circumstances under which international criminal law – and to some extent domestic criminal law – can hold corporate officials criminally responsible when they participate in crimes under international law. The focus of this section is not when corporations and their officials are the direct perpetrators of international crimes. It rather deals with criteria of criminal responsibility when businessmen are involved with other actors of international crimes.

Section 2: Food Regulation and Criminal Justice

Section 2 of the Congress is dedicated to the criminal law enforcement of foodstuffs violations. The adulteration of foods by means of the addition of foreign substances and chemicals has happened ever since the time of the very first traders. Compared to traditional food fraud (adulteration or mislabelling) several recent food scandals – some of which became notorious due its scale and effect¹¹ – evidence that fraudulent schemes take advantage of the weaknesses of an increasingly globalised food supply thereby impacting hugely on consumers and operators as well as on the economy. Food crime represents, thus, a growing global concern and there is an ever louder call to punish those guilty of food fraud. Traditionally, serious violations of food safety regulations could constitute a criminal offence. Beyond these traditional – regulatory or

⁶ According the study conducted by the International Commission of Jurists (ICJ) in 2008, in-house company lawyers and compliance officers rarely consider international criminal law relevant for the business operations of their companies. See ICJ, *Corporate Complicity & Legal Accountability* (Geneva, 2008, Vol. II).

⁷ J.P. Bohoslavsky and Mariana Rulli, 'Corporate Complicity and Finance as a "Killing Agent": The Relevance of the Chilean Case' (2010) 8 *Journal of International Criminal Justice* 829; J.P. Bohoslavsky and V. Opgenhaffen, 'The Past and Present of Bank Responsibility for Financing the Argentinean Dictatorship' (2009) 23 *Harvard Human Rights Journal* 157.

⁸ For example, private air companies faced criticism for transporting prisoners to locations where they faced torture or enforced disappearance. See D. Marty, *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states, Draft report – Part II* (Explanatory memorandum, Council of Europe, AS/Jur, 2006, 16 Part II).

⁹ W. Huisman and E. Van Sliedregt, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity' (2010) 8 *Journal of International Criminal Justice* 803.

¹⁰ See J. Geneuss et al., 'Core Crimes Inc.' (2010) 8 *Journal of International Criminal Justice* 957.

¹¹ In the China milk scandal two of the main participants were sentenced to death, and the general manager of the company at the centre of the scandal was sentenced to life imprisonment.

criminal food safety – offences there is a debate on the use of criminal law for combatting intentional tampering with the food supply.

In light of the fast technological evolutions and socio-economic developments, food crime definitions have become increasingly detailed and/or technical, often including many cross-references to other legal provisions; or vague in order to give administrative and judicial authorities greater flexibility (to prevent or) to react to foodstuff violations. This evolution raises serious concerns with respect to the qualitative requirements of legal certainty, in particular on the foreseeability (*lex certa and fair warning*) and the accessibility of the criminal law. Section 2 of the Congress shall focus both on traditional and new forms of food crime and study the technique of criminalization and sanctioning.

Section 3: The Interplay between Administrative and Criminal Enforcement in the Area of Corporate Business and Criminal Justice

Section 3 of the Congress will study the various public sanctioning and enforcement mechanisms and their interaction in the field of corporate crime. In light of the potentially widespread or systemic consequences of corporate crime, prevention and control are key concerns. To this end, legislatures, administrative and judicial authorities rely increasingly on compliance programmes and pre-conviction measures as substitutes for actual punishment. Furthermore, there is a tendency to flank criminal sanctions with, or even replace them by, highly intrusive administrative sanctions or collateral consequences (e.g. professional ban, withdrawal of a licence, or debarment). Even though the latter sanctions and consequences are usually not treated as formal criminal sanctions, they are nonetheless assumed to have an equally, if not stronger deterrent effect on corporations and individuals than actual criminal sanctions.

In order to avoid and combat the pervasive consequences of corporate crime, new regulatory and public enforcement mechanisms have been put in place in many countries. A diversification of enforcement tools is supposed to be more effective. The combination of enforcement tools results, however, in a variety of procedural problems, in particular as regards exchange and use of evidence as well as issues of administration of justice, e.g. concerning cooperation and coordination between competent authorities.

There is a tendency to label certain enforcement mechanisms ‘administrative’ even though the investigative powers and sanctions may be as coercive and intrusive as the powers and sanctions under (formal) criminal law. This shift to punitive administrative law creates quite some uncertainty with regards to the applicable procedural safeguards, in particular because it is not always clear from the outset whether an administrative proceeding may lead to or encompasses a criminal charge in the

meaning, for example, of Article 6 European Convention of Human Rights.¹² More in general and beyond the European context, the interplay between criminal enforcement and other types of public enforcement mechanisms creates substantial tensions at the level of procedural safeguards. In an effort to develop better solutions for future – national and international – legal policy, Section 3 of the Congress will analyze, compare and evaluate the efficiency and the procedural safeguards of the various sanctioning and enforcement systems against corporate crime.

Section 4: Prosecuting Corporations for Violations of International Law: Jurisdictional Issues

There is growing evidence of the role multinational corporations play in massive human right violations. Such violations may amount to ‘international core crimes’ - i.e. those included in the jurisdiction of the International Criminal Court (ICC) – or can constitute ‘treaty crimes’¹³ such as, for example, corruption, environmental crimes, trafficking crimes, financial crimes, tax crimes, etc. International treaties impose obligations on states parties to criminalise certain conduct and endorse States Parties to cooperate in the prosecution of suspects across borders.¹⁴ Some of them oblige State Parties to impose ‘effective, proportionate and dissuasive’ sanctions over legal persons, however, these sanctions may be civil, administrative or criminal according to the national system of the state concerned.¹⁵ When it comes to prosecuting corporations, international treaties do not oblige state parties to impose corporate criminal liability¹⁶ and thus prosecuting corporations is left for national law.¹⁷ However, international human rights treaties impose on States a positive duty to investigate, prosecute and adjudicate serious human rights violations¹⁸. These violations can stem from international core

¹² See for example F. Galli and A. Weyembergh (eds.), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU* (Brussels, Editions de l’Université de Bruxelles, 2014); C. Harding, ‘The interplay of criminal and administrative law in the context of market regulation: the case of serious competition infringements’ in V. Mitsilegas, P. Alldridge and L. Cheliotis (eds.), *Globalisation, Criminal Law and Criminal Justice: Theoretical, Comparative and Transnational Perspectives* (Oxford, Hart, 2015) 199.

¹³ See R. Cryer, *Prosecuting International Crimes* (Cambridge, Cambridge University Press, 2005) 1; I. Bantekas, *International Criminal Law* (4th ed., Oxford, Hart, 2010) 9.

¹⁴ For example, the United Nations Convention Against Corruption (UNCAC) requires States Parties to cooperate internationally to implement the Convention (Art. 62) and authorises the Conference of State Parties to establish new mechanisms and bodies to assist them in such implementation (Art. 63). Furthermore, the UNCAC is a basis for international cooperation in extradition (Art. 44) mutual legal assistance between states (Art. 46), transfer of criminal proceedings (Art. 47) and law enforcement cooperation (Art. 48).

¹⁵ See Art. 10 of the UN Convention Against Transnational Organized Crime (UNTOC) and Art. 26 of UNCAC.

¹⁶ I. Bantekas, *op.cit.* 76.

¹⁷ Today no international forum has jurisdiction to prosecute corporations: see e.g. Art. 25 of the Rome Statute of the International Criminal Court (ICC).

¹⁸ See for instance artt. 4 and 5 of the UN Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and artt. 4 and 5 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

crimes, but also from illegal conduct related to common offences, such as trafficking in human beings¹⁹, trafficking in illegal pharmaceutical products²⁰, illegal mining or terrorism²¹.

In a globalised economy, the transnational dimension of business activities and the multinational structure of corporations easily can lead to situations where more than one state is willing to exercise its jurisdiction over a rogue corporation in order to prosecute it before its national courts. Furthermore, there is a tendency to extend national jurisdiction to corporations who commit crimes outside of the national borders, as in the case of bribery of foreign officials.²² International conventions do not help solve those situations in which corporations might be subject to several sanctions and proceedings in different countries for the same facts. Section 4 of the Congress is devoted to “Prosecuting corporations for violations of international law” and shall address the legal problems of exercising national criminal jurisdiction over corporations. Overlapping and conflicting use of jurisdiction, extraterritorial use of jurisdictions and unilateral universal jurisdiction will be studied both in the field of the international core crimes, as in the field of the common offences with similar problems.

¹⁹ 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.

²⁰ See for instance art. 36 of the UN Single Convention on Narcotic Drugs of 1961.

²¹ See for instance 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.

²² I. Bantekas, *op. cit.* 77.