

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

## – Questionnaire for National Reports

XX. AIDP-IAPL International Congress of Penal Law /Section 4

### A. Introduction

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#### General Explanation

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 it had gradually replaced the personality principle. In criminal law, however, concurrent jurisdictional claims have always been present and have recently gained new importance due to a 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.). The U.N. Human Rights Council set a global standard by adopting the United Nations Guiding Principles on Business and Human Rights (UNGPs or *Ruggie principles*<sup>1</sup>), which address possible adverse impact on human rights linked to business activity. According to that standard not only have states a duty to protect human rights, but corporations must respect them, too, and victims of business-related abuses must have access to a legal remedy.

Your report should explain your 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 asks about the general framework of national law as the basis of cross-border prosecution of white-collar crime.

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UNHRC 17/4 of 16 June 2011, A/HRC/17/L.17/Rev.1,  
<<http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session17/Pages/ResDecStat.aspx>>.

## **A. General Framework for Prosecuting Corporations for Violations of International Criminal Law**

Please, *briefly* cover your country's law in theory and in practice, as well as the public debate with regard to the task of prosecuting corporations for core crimes and/or "treaty crimes" committed abroad, using the following questionnaire ...

### **I. Legal Framework & Relevant Actors**

#### **1. Legal Rules governing the prosecution of corporations – **in a nutshell****

##### ***a) Substantive Criminal Law establishing criminal liability***

What is the doctrinal basis (attribution of individual fault to the corporation; or "corporate blame")? Is corporate criminal liability limited to specific offenses?

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

What is the procedural framework for prosecuting a corporation? Are there special rules, especially for fact-finding? How is the corporation represented in court? Is it possible to try a corporation (or an individual) *in absentia*?

#### **2. Principles of Jurisdiction /Building the nexus – **in a nutshell****

Please explain your country's general rules and laws on jurisdiction with regard to transnational crime. What is the underlying rationale? Is your country traditionally actively interested in prosecuting offenses committed abroad? Is the passive personality principle recognized? May the set-up of criminal liability of corporations combined with the concept of territorial jurisdiction create areas of impunity for responsibility or do they rather built up ~~for~~ vehicles for foreign claims?

##### ***a) Defining jurisdiction – **in a nutshell*****

How is jurisdiction specified in your national system? Does your country distinguish between jurisdiction to prescribe and jurisdiction to adjudicate?

#### **3. International Law / Human rights framework**

Please indicate the *relevant* international conventions/ human rights framework that may determine your country's prosecution of "core crimes" or "treaty crimes".

#### **4. Framework for Prosecuting a Cross-Border Case – **in a nutshell****

How is a cross-border- case built in your criminal justice system? (When) Must the defendant be present? Is there a difference between cases against individuals and cases against corporations?

## **5. Prominent cases, media coverage**

In your country, have prominent cases<sup>2</sup> triggered a public debate? Does the media discuss the usefulness and legitimacy of prosecuting corporations for violations of international law abroad?

## **6. Statistics**

Do prosecution or court statistics contain data on CCR, especially on prosecution/conviction of corporations for violations of international criminal law?

## **7. Public debate on Corporate Social Responsibility?**

Has the accountability of corporations and their compliance with the law and certain ethical standards been subject to recent debate? Has there been a debate on CCR, including the exclusion of CCR in Art. 25 ICC Statute? More specifically, has there been a debate on differences between corporations' accountability for their domestic conduct and their conduct abroad? Is there a political movement concerning CCR? (cf. in Switzerland <http://www.droitsansfrontieres.ch/fr/agenda/>). What is the role of NGOs in that regard?

# **B. Holding Corporations Accountable – the Jurisdictional Issue**

## **I. General Jurisdiction / General Aspects of Jurisdiction**

### **1. General Jurisdiction – Generals**

Is there a general doctrine underlying the rules of jurisdiction? If so, is the decision on jurisdiction rather based on a “jurisdictional reasonableness”-approach primarily taking into account the affected states' interests? Or does the balancing of interests seek to do justice to the defendant? Does the prosecution of corporations for crimes allegedly committed abroad fit into that doctrine?

### **2. Territorial Jurisdiction**

Is territoriality the standard parameter for establishing jurisdiction? If so, what is the historical context and the justification of the preference for territoriality? (e.g., right to be tried by one's peers? “Recht auf den gesetzlichen Richter?” Evidentiary concerns? National concerns?).

#### **a) Legal Framework**

What are the statutory rules defining territorial jurisdiction, and what is their historical context? Can territoriality be based on where the defendant has acted and/or where his act took effect?

#### **b) Practice; (High Court) Jurisprudence**

How do courts handle territoriality, especially with respect to cross-border crimes? Do courts tend to restrict or broaden the concept of territoriality? Do they emphasize the “conduct doctrine” or the “effects doctrine”? Does case law address the concepts of “objective territoriality” (act has been initiated abroad, but completed on one's territory) and “subjective territoriality” (act has been initiated on one's territory, but completed abroad)? Does case law address the evidentiary problems of fact-finding abroad?

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As have, for instance, the following cases: U.S. Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 2013; Tribunal cantonal, Canton de Vaud, *Décision du 17 septembre 2013*, Nr. PE12.010550-FMO and Swiss Bundesgericht 6B\_7/2014 vom 21.07.2014; *Prosecutor v. Van Anraat*, Netherlands, LJN: BA6734, *Gerechtshof's-Gravenhage*, 2200050906-2, May 9, 2007; *Arrêt du Tribunal Administratif de Toulouse*, 2ième chambre, 16 Mai 2006, n. 0104248; *United States of America vs. Carl Krauch, et al.*, (“I.G. Farben”, see for documentation <http://www.profit-over-life.org/international/deutsch/index.html>).

### **3. Extraterritorial Jurisdiction**

Does your criminal justice system have a presumption against extra-territorial jurisdiction? If so, do courts take the presumption seriously? Which interests are recognized bases of extraterritorial jurisdiction (e.g., state interests affected, nationality of alleged offender)?

#### **a) *Active Personality (or Nationality) Principle***

##### **aa) *Generals***

If your country recognizes the active personality principle, what is the underlying rationale (e.g., avoiding impunity of nationals, protecting state's reputation abroad)? What are the constitutive elements of this principle? Does the law take into consideration whether the act also constitutes a crime according to domestic law? Does the principle extend only to serious crimes? Is the principle regarded as an exception and used reluctantly?

##### **bb) *Corporations and the Active Personality Principle***

May corporations be held liable under the active personality principle, or does it extend only to natural persons? May corporations be prosecuted only for certain economic offenses? How is nationality of corporations established (e.g., "control theory", place of registration)?

#### **b) *Passive Personality Principle***

##### **aa) *Generals***

Does your country extend its jurisdiction in accordance with the passive personality principle? Is that principle regarded as having equal rank with other principles of jurisdiction? What are the requirements for jurisdiction under that principle? Does it only extend to serious offenses or only to terrorism? Is the principle regarded as an exception and used reluctantly (e.g., only if your country's nationals are not protected abroad, or if an alleged wrongdoer cannot be extradited)? Are there substitutes for criminal prosecution under the passive personality principle, e.g. torts claims?

##### **bb) *Corporations and the passive personality principle***

May corporations be held liable under the passive personality principle, or does it extend only to natural persons? Is it applicable only to certain economic offenses? How is nationality of corporations established (e.g., "control theory", place of registration)?

#### **c) *Protective Principle***

##### **aa) *Generals***

Does your country extend its jurisdiction in accordance with the protective principle? Is that principle regarded as having equal rank with other principles of jurisdiction? What are the requirements for jurisdiction under that principle? What state interests are protected? Does the protective principle only extend to serious offenses or only to terrorism? Is your country concerned that the protective principle might be abused (by other countries), e.g., to prosecute political opponents? Does your country fear that the use of the protective principle could harm international relations?

##### **bb) *Corporations and the passive protective principle***

Are corporations targeted under the regime of secondary boycotts, i.e. extraterritorial measures in order to enforce a (international) boycott (as for instance under the U.S. Helms-Burton Act)? Are there substitutes for criminal prosecution under the protective principle, e.g. torts claims?

**d) *Jurisdiction over military personnel and/or private military contractors***

Does your country establish criminal law jurisdiction over persons acting under its military order? If so, does this jurisdiction apply in the same way to private military contractors or other outsourced services staff?

**e) *Vicarious Jurisdiction – Stellvertretende Strafrechtspflege***

Does your country prosecute alleged offenders acting for another State, if extradition is not possible? If so, under what conditions?

**4. Universal jurisdiction**

Does your criminal justice system apply universal jurisdiction? If so, for which offenses? Do courts make frequent use of the universality principle? Is the principle applied even when the alleged offender is not present in your country?

Are there cases where the universality principle has been applied to corporations?

**5. Other sources of jurisdiction**

Has your legal system established other, “creative” grounds of jurisdiction in order to hold corporations liable? Has the effects doctrine been interpreted broadly in order to extend jurisdiction to foreign corporations? Do such bases of jurisdiction exist for typical white collar-crimes, for instance, violations of anti-trust law?

**6. Transitional justice mechanisms**

Are there special rules on extraterritorial jurisdiction for special justice mechanisms, e.g., truth and reconciliation commissions, local justice, reparation schemes for victims?

**II. Jurisdiction for Prosecuting Corporations under International Law (UN Law, multi-lateral treaties)**

**1. General**

Does your country base its jurisdiction on international treaty or customary law? Are there any requirements for establishing such jurisdiction (e.g., seriousness of the offence, evidence to be found in your country, international law demanding prosecution)? Is there an underlying doctrine supporting this jurisdiction? If so, is it a standard of “jurisdictional reasonableness” that primarily takes the affected states’ interests into account? Or is it a balancing of interests that seeks to do justice to the defendant?

**2. Jurisdictions prescribed by International Humanitarian Law – Core Crimes**

Has your country implemented the jurisdictional requirements of International Humanitarian Law? What are the constitutive elements? Are there any specifics?<sup>3</sup>

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See, e.g., Art. 4 and Art. 5 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, 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, Art. 36 of the UN Single Convention on Narcotic Drugs of 1961, 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.

### **3. Jurisdiction based on Customary International Law**

Does your country acknowledge jurisdiction based on Customary International Law? If so, under what conditions and on which offenses?

## **C. Overlapping Domestic Legal Frameworks and the Prosecution of Corporations**

### **I. Conflicts of jurisdiction – General**

Please assess whether your system is rather dominant or reluctant in claiming jurisdiction in cross border-cases. Do you think that there is rather a problem of positive or of negative conflicts of jurisdiction?

### **II. Overlapping Domestic jurisdictions – in a nutshell**

Can corporations be held accountable in collateral legal domestic frameworks (torts, administrative sanctions etc) for providing financing or other involvement in atrocities abroad?

### **III. Conflicting International jurisdictions – in a nutshell**

In your national system, do specific provisions or case law address problems of international jurisdiction conflicts; when prosecuting corporations for “core crimes” or “treaty crimes” abroad (either with regard to prosecution in another country, civil or administrative litigation or settlements in arbitration courts)?

## **D. Proposals for Reform of the Legal Framework of Jurisdiction**

In your state, is there a discussion about the role of rules on jurisdiction for defending sovereignty or for fixing global problems?

## **E. CONCLUSION**

How does your criminal justice system generally address the issue of corporate criminal responsibility for acts committed or having effects abroad? Is there a movement – inside or outside the legal community – in favour of holding corporations accountable in such cases? Are there general doctrines that deal with this situation? Are reforms of the law foreseeable?

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### **General Explanation:**

It is our goal to present every criminal justice system adequately in the overall project. The specific issue we want to discuss on the basis of the country reports is the tension between traditional approaches to jurisdiction (generally based on territoriality) and more-recent movements toward extra-territorial jurisdiction, motivated by a wish to protect human rights beyond national borders, possibly even holding companies accountable for their involvement in human rights violations. I would suggest that we take the *Ruggie principles* (see introduction) as a benchmark for this discussion.

For documentation, please use footnotes and give full citations to page numbers of text cited. If certain aspects of jurisdiction are not well documented in your country, please feel free to use what sources you can find.

If you would like to modify questions or add more questions, please contact me at any time.

**Thank you very much!**