

## Section I: Criminal Law. General Part

### **XX AIDP International Congress of Penal Law Criminal Justice and Corporate Business**

#### **Individual Liability for Business Involvement in International Crimes Questionnaire for National Reports**

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##### A. Defining the Scope of the Questionnaire

Section 1 of the XX AIDP International Congress of Penal Law (Preparatory Colloquium- Argentinian National Group to be held in Buenos Aires in March 2017) focuses on the current challenges criminal law encounters in determining individual liability for the most-egregious crimes committed with the involvement of economic actors.

The issue at stake is part of the general topic of “corporate complicity”, which designates a multifaceted phenomenon: different types of entrepreneurs and businesses can be involved in international crimes in different ways and in different contexts. The Expert Panel of the International Commission of Jurists, for instance, in its reports on corporate complicity referred to liability in civil cases brought against companies under the US Alien Tort Statute, as well as criminal liability of individuals in the form of aiding and abetting/accomplice liability. The scientific debate has also widely highlighted the needs and obstacles of making corporations criminally liable for gross violations of human rights, both at the domestic and at the international level.

The Questionnaire focuses on the following specific topics:

- criminal acts of corporations, namely multinational corporations (both private and public);
- crimes amounting to serious violations of human rights, and in particular ‘core crimes’ foreseen by the Rome Statute (genocide, crimes against humanity, war crimes), and not all kinds of Treaty crimes or domestic ones;
- individual criminal liability of civilians, and in particular ‘corporate officials’, and not corporate liability, civil and administrative liability of individuals, individual liability of the military (which will be only indirectly dealt with, as far as their analysis is relevant for the proposed issues).

##### B. Historical Background and Criminological Framework

The historical background of this issue dates back to the aftermath of the Second World War when the “generals in grey suits” were called to answer before criminal courts. In the so-called Control Council Law No. 10 Trials, the Krupp, Flick, Farben and Zyklon B cases represent the first attempts to hold individuals accountable for their business activity under international criminal law. Corporate officers and owners of German firms were indicted for crimes against humanity (slave labour and torture), war crimes (slave labour and pillage), complicity in the crime of aggression and mass murder, and aiding and abetting murder, cruelties, brutalities, torture, atrocities, and other inhumane acts.

From the criminological point of view, the awareness of the involvement of economic actors into gross violations of human rights has arisen in the scientific debate in the last decade, as a consequence of both the increasing number of proceedings held before national and international

courts and the growing acknowledgment of the need to protect victims and to restore justice. Specialists have identified numerous cases all over the world, in particular in connection with military dictatorships and authoritarian regimes. In the Argentinian experience, for instance, prosecutions were held against civilians for their role in the military dictatorship, including some businessmen who were charged with abductions, detention in clandestine detention centres, torture, murder and/or disappearance. The same occurred in some European countries, namely in the Netherlands for crimes committed abroad, particularly in the American region, in Africa and in Asia. The United States judges have also largely dealt with these kinds of cases, mostly from the point of view of civil law.

Scholars have identified different scenarios in which such crimes can occur. Typical forms of corporate involvement in international crimes include cooperation of businessmen with military regimes and dictatorships, as well as corporate involvement in war zones and other conflict areas. The Redflags NGO has also tried to systematize such conduct, by distinguishing several categories of corporate crimes: expelling people from their communities; forcing people to work; handling questionable assets; making illicit payments; engaging in abusive security forces; trading goods in violation of international sanctions; providing the means to kill; allowing use of company assets for abuses; and financing international crimes.

Having regard to the legal-enforcement approach, scholars distinguish three types of involvement with corporations: direct perpetrators through their employees and managers, accomplices through their assistance in the commission of international crimes by the principal perpetrators, for instance by providing logistical support and by passing on certain information. More indirect forms of involvement consist of benefiting from the commission of international crimes ('beneficial involvement') and silent approval, by continuing to do business with dictatorial regimes.

### C. Assessing Individual Criminal Liability of "Corporate Officials"

In this context, criminal law faces, both at the domestic and at the international level, a high number of obstacles in assessing individual criminal liability of "corporate officials".

First, scholars highlight the difficulty in drawing the line between lawful business and corporate complicity in international crime, with reference to the so-called 'neutral actions', like the provision of goods or financial resources. In these cases, as pointed out, it is hard to distinguish between the morally condemnable behaviour of 'doing business with a bad actor' and criminally relevant contributions to another entity's international crimes.

Second, internal structure and organization within corporate actors make individual criminal liability difficult to be assessed: as corporations are generally composed of complex structures and webs of relations, those responsible for the company's involvement in a crime may be located at a great distance from the place of its actual commission, giving rise to serious difficulties in identifying and prosecuting them. The need to take into account owners, top-ranking corporate officials and other corporate officials arises, as well as the necessity to distinguish among them.

Third, international criminal courts have widely focused their efforts on military and political officials who were involved in committing crimes under international law. In contrast, the responsibility of corporations or their management for their involvement in international crimes has been at most of marginal interest in international prosecution efforts.

Finally, and as a consequence of the previous remarks, domestic norms and doctrines on perpetrators/co-perpetrators/accomplices are partially unable to deal with individuals situated so far from the commission of the offence. If it is true that corporations and businessmen, when implicated in gross human rights violations may be qualified as accomplices/participants or indirect perpetrators, many obstacles arise when trying to establish principal liability for those who participate

remotely. In particular, it is difficult to prove the alleged perpetrator's or accessory's mens rea, in terms of knowledge and intent.

The Preparatory Colloquium will offer a wide comparative view of the domestic legal framework applicable to such a complex legal issue and suggest some possible changes to be taken into consideration both at the domestic and international level. The need for a balance between the effectiveness of criminal liability in relation to these egregious crimes and the protection of fundamental rights, which can be threatened by an excessive extension of punitive responses, will be constantly taken in account.

## **Questionnaire**

National rapporteurs are asked to present their country's legal framework (norms, prominent doctrine and case-law) with regard to the individual liability for business involvement in international crimes, using the following questionnaire.

### **I. Foreword**

1. Briefly refer to the public debate in your country, if any, on individual liability for business involvement in international crimes.
2. Briefly report the main cases of business involvement in international crimes, if any, which have been prosecuted/adjudicated before criminal courts in your country.
3. Briefly report the main cases of business involvement in international crimes, if any, which have been brought before civil courts in your country.

### **II. General Remarks (in a nutshell)**

4. Briefly if, and in which manner, your national legal system has incorporated in domestic criminal law:
  - a. 'core crimes' as foreseen by the ICC Statute amounting to serious violations of human rights (genocide, crimes against humanity, war crimes as categories and main offences encompassed in them: torture, slavery, abduction, deportation, murder, forced disappearance, etc.).
  - b. other offences amounting to serious violations of human rights, if any in your domestic legal order that you consider relevant for the topic.
  - c. Please specify if definitions in domestic criminal law developed certain elements of the crime in comparison to ICL.
5. Briefly summarize the position of your national legal order in relation to individual modes of responsibility, by referring both to principals and accessories.
6. In particular the following elements can be taken into account (not exhaustive and not a compulsory list):
  - d. Does your domestic legal order acknowledge the principle of personal criminal liability (legal source and definition)?
  - e. Does your domestic legal order provide a unified participation system or a differentiated one?
  - f. Does your domestic legal order punish ordering, instigating, aiding and abetting, and other forms of accessory liability?

- g. Does your domestic legal order punish moral complicity (also in the forms of approval, non-withdrawal, mere presence)?
- h. What are the minimum requirements an accomplice contribution must fulfil (causal link or other)?
- i. What are the subjective requirements (mens rea) of complicity?
- j. How does your legal system treat the case of a contribution by a person not holding the official position in a crime requiring the perpetrator to hold such a position (extraneus)?
- k. Does your legal system recognize special rules for offenses which must be committed personally, e.g., certain crimes against sexual integrity?
- l. What is the legal framework applicable in the case of excess of the perpetrator? The commission of a crime that is not embraced by the intent of other accomplices shall be deemed to be an excess of the perpetrator.
- m. What is the impact of different modes of participation on the sentence?

### III. Corporate Complicity and Actus Reus

7. In connection with the international crimes mentioned above (question 4), may corporate owners, top-ranking corporate officials and other corporate officials be held criminally responsible as perpetrators/co-perpetrators/accomplices for ordinary/routine/stereotyped acts, like supplying goods, services, logistics, information ('neutral acts'), if these acts in fact provide substantial aid for the criminal act?

8. In particular the following elements can be taken into account (not exhaustive and not a compulsory list):

- a. providing goods or material means generally used for lawful ends (e.g., vehicles, computer programs or chemicals);
- b. providing goods or material means dangerous in nature (e.g., weapons);
- c. supplying financial services;
- d. providing financial means;
- e. providing logistical support (e.g., passing on certain information);
- f. benefiting from the commission of international crimes.

9. In connection with the international crimes mentioned above (question 4), may corporate owners, top-ranking corporate officials and other corporate officials be held criminally responsible as perpetrators/co-perpetrators/accomplices for omission (omitting control)?

10. If perpetration by omission is admitted, what are the reasons for establishing an obligation to actively avert harm?

### IV. Corporate Complicity and Mens Rea

11. In connection with the international crimes mentioned above (question 4), in order to hold corporate owners, top-ranking corporate officials and other corporate officials criminally responsible as perpetrators/co-perpetrators/accomplices, is a prior agreement or a common plan required?

12. In connection with the international crimes mentioned above (question 4), in order to hold corporate owners, top-ranking corporate officials and other corporate officials criminally responsible as perpetrators/co-perpetrators/accomplices, what is the required mens rea (please specify both knowledge and intent, including dolus eventualis and other forms) ?

13. In connection with the international crimes mentioned above (question 4), may corporate owners, top-ranking corporate officials and other corporate officials be held criminally responsible as perpetrators/co-perpetrators/accomplices for negligent conduct/participation?

#### V. Corporate Complicity and Indirect Perpetration

14. In connection with the international crimes mentioned above (question 4), may corporate owners, top-ranking corporate officials and other corporate officials be held criminally responsible under the doctrine of indirect perpetration using an organisation?

15. In particular the following elements can be taken into account (not exhaustive and not a compulsory list):

- a. Does your domestic legal order require an agreement or common plan between two or more persons?
- b. Does your domestic legal order require a coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime?
- c. Does your domestic legal order require any individual to fulfil the subjective elements of the crime with which he/she is charged?
- d. Does your domestic legal order require the co-perpetrators to be all mutually aware of the risk that implementing their common plan may result in the realisation of the objective elements of the crime?
- e. Does your domestic legal order require that all co-perpetrators mutually accept such a result by reconciling themselves with it or consenting to it?

#### VI. Corporate Complicity and Collective/ Inchoate Offences

16. In connection with the international crimes mentioned above (question 4), may corporate owners, top-ranking corporate officials and other corporate officials be held criminally responsible as accomplices or as members of a criminal group or for taking part in a conspiracy aimed at committing those crimes?

17. In connection with the international crimes mentioned above (question 4), may corporate owners, top-ranking corporate officials and other corporate officials be held criminally responsible as a member of a Joint Criminal Enterprise (JCE) as admitted before the ICT's (ICTY and ICTR above all)?

18. In connection with the international crimes mentioned above (question 4), may corporate owners, top-ranking corporate officials and other corporate officials be held criminally responsible pursuant to the command responsibility doctrine, if it is applicable to civilians?

#### VII. Corporate Complicity and 'White Collar Crime' Doctrine

19. In connection with the international crimes mentioned above (question 4), may corporate owners, top-ranking corporate officials and other corporate officials be exempted from criminal liability by delegating functions to subordinates? Under which conditions is delegation admitted ?

20. In connection with the international crimes mentioned above (question 4), may corporate owners, top-ranking corporate officials and other corporate officials be held criminally liable for taking part in collective decisions giving rise to the offence (collegiate offences)?

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21. In connection with the international crimes mentioned above (question 4), may de facto corporate owners, top-ranking corporate officials and other corporate officials be held criminally liable?

22. In connection with the international crimes described above (question 4), may individuals holding a position of control over the company but not managing it be held criminally liable? Under which conditions?

23. If criminal/administrative liability of corporations is admitted in your legal order for the crimes described above, please specify who are the individuals whose activity implicates the corporation's responsibility and under which conditions.

24. If criminal/administrative liability of corporations is admitted in your legal order for the crimes described above, please specify if individual criminal liability may be shielded or diminished where corporations themselves are held responsible.

VIII. Corporate Complicity and Defences

25. In connection with the international crimes mentioned above (question 4), may corporate owners, top-ranking corporate officials and other corporate officials be exempted from criminally liability if justifications, excuses or other grounds for excluding responsibility apply (please refer to the locus commissi of the offence and, where admissible, to the place where the corporation operates, according to your national criminal law and jurisprudence) ?

26. In particular the following elements can be taken into account (not exhaustive and not a compulsory list):

- a. Can an individual be exempted from criminal liability by claiming that the crimes of the perpetrators were undertaken pursuant to legislation applicable at the time?
- b. Can an individual be exempted from criminal liability by claiming that the crimes of the perpetrators were ordered by competent authorities (due obedience)?
- c. Can an individual be exempted from criminal liability by generally claiming to fear if he/she did not collaborate?
- d. Can an individual be exempted from criminal liability or his liability mitigated claiming coercion, state of necessity or duress?
- e. Can an individual making substantial contribution to the criminal activity of the perpetrators be exempted from criminal liability if he/she manages to prove that he lacked command authority or any kind of influence over the perpetrators thereof ?

IX. Suggestions and Conclusion

27. Do not hesitate to mention any relevant point you think the Questionnaire has missed and give suggestions where applicable.

28. Summarize, where applicable, legal reforms that have been proposed or you would recommend in your domestic legal order.

29. Please state briefly the main conclusion of your National Report.