

TWENTIEETH INTERNATIONAL CONGRESS OF PENAL LAW (Rome, 13-16 November 2019)

Section I: Individual liability for business involvement in international crimes

Preamble

Noting that corporations may be involved in conduct giving rise to serious violations of human rights as a result of their risky business or as a consequence of their routine activities (such as industrial production or financial services) and especially the growing transnational character of these activities;

Taking into account that such conduct can amount to international crimes, namely to genocide, crimes against humanity, and war crimes, according to the definitions encompassed in articles 6, 7 and 8 of the Statute of the International Criminal Court, as well as serious violations of human rights, foreseen as crimes by international treaties or *ius cogens*, such as torture, slavery, forced labor, enforced disappearance, and trafficking of human beings, hereafter referred to as "international crimes".

Welcoming the efforts made by the international community to hold corporate actors accountable for illicit conducts amounting to serious violations of human rights;

Taking into consideration, among others, the UN *Guiding Principles on Business and Human Rights*, adopted in 2011,¹ the *OECD Guidelines for Multinational Enterprises*, reformed in 2011,² the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*,³ adopted 2011 and the *Policy paper on case selection and prioritization issued by the Office of the Prosecutor before the International Criminal Court*, adopted in 2016;⁴

Emphasizing that, in responding to such conducts that affect human rights, different approaches coexist within national legal systems that encompass both administrative and civil responses;

Stressing the need for a criminal law framework to effectively tackle the conduct of corporate actors amounting to international crimes;

Recalling the judgments issued in the aftermath of the Second World War for business involvement in international crimes, and the recent case law in particular in countries where those crimes have been committed or where the corporations are established or operate;

Recognizing that many domestic criminal legal systems have embraced the principle of criminal or quasi-criminal liability of corporations, and that this can contribute to preventing and redressing these crimes;

Convinced that, independently of corporate liability, criminal law responses must address specifically the conduct of individuals acting inside corporations, namely corporate executives, corporate officials, and, where applicable, corporate owners;

Observing that the prosecution and punishment of corporate executives, corporate officials and, where applicable, corporate owners, for international crimes remains an exception;

Considering the need to respect the basic rules established in every national legal order in relation to individual criminal liability and complicity;

Referring to the existence of rules provided in national legal orders, in conformity with their criminal law traditions, in relation to participation in a criminal organization or conspiracy;

Recognizing that, where corporate executives, corporate officials, and, where applicable, corporate owners have *de iure* or *de facto* authority and control or a duty of care, business criminal law has substantially contributed to defining the scope of their criminal liability

Acknowledging that international criminal law has contributed to the development of rules on individual criminal liability and complicity in specific relation to "core crimes";

Underlining the necessity of a fair system of attributing individual criminal liability for business involvement in human

¹ UN Guiding Principles on Business and Human Rights available at <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

² OECD Guidelines for Multinational Enterprises available at <<http://mneguidelines.oecd.org/annualreportsontheguidelines.htm>>.

³ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights available at <<http://www.etoconsortium.org/en/main-navigation/library/maastricht-principles/>>.

⁴ Policy paper on case selection and prioritization issued by the Office of the Prosecutor before the International Criminal Court available at <https://www.icc-cpi.int/itemsdocuments/20160915_otp_policy_case-selection_eng.pdf>.

rights violations and the importance of preserving human rights, even in the context of prosecuting and punishing the most grave crimes;

Reiterating the need to endorse and fully respect the basic principles of criminal law in the assessment of individual criminal liability, in particular the principle of personal liability and the principle of culpability;

Regarding the need to share experiences and develop a coordinated effort among different domestic legal orders, in order to compare and, where possible, harmonize criminal responses in relation to individual liability for business involvement in international crimes;

Recalling previous AIDP Resolutions, especially those referring to participation and complicity,⁵ international crimes, and domestic criminal law,⁶ as well as criminal association and organized crime;⁷

Adopts the following Resolutions:

1. Corporate executives, corporate officials and, where applicable, corporate owners should be held criminally liable for complicity in international crimes, namely to genocide, crimes against humanity and war crimes, according to the definitions encompassed in articles 6, 7, and 8 of the Statute of the International Criminal Court, as well as serious violations of human rights, foreseen as crimes by international treaties or *ius cogens*, such as torture, slavery, forced labor, enforced disappearance, and trafficking of human beings, hereafter referred to as "international crimes", in accordance with the principle of personal liability and the principle of culpability.

State parties to international conventions containing penal provisions should make international crimes punishable in their domestic legislation, either via a specific act enacting international conventions or, where admitted, through the direct application of such conventions, provided they contain sufficiently precise provisions.

2. Corporate executives, corporate officials and, where applicable, corporate owners should be held criminally liable for involvement in international crimes whether as perpetrator, co-perpetrator, indirect perpetrator, instigator, aider, abettor, or another form of accessory, according to the fundamentals of criminal law and obligations deriving from international law.

3. Corporate executives, corporate officials, and, where applicable, corporate owners should be held criminally liable according to the general rules on complicity provided that the minimum requirements of the complicit act are met, both in terms of *actus reus* and *mens rea*.

4. In relation to so-called "neutral acts" (e.g. providing legitimate goods and services to authoritarian regimes), the punishment of ordinary and legitimate business activities or, conversely, the shielding of corporate actors who intentionally support serious violations of human rights must be avoided. Corporate executives, corporate officials, and, where applicable, corporate owners should be held criminally liable for neutral acts where they act with *dolus directus*. They should be held liable, according to national legislation, where they act with *dolus eventualis*.

5. Corporate executives, corporate officials, and, where applicable, corporate owners should be held criminally liable for complicity by omission in international crimes where, under the general rules of criminal law, there exists a "guarantee position" such as the legal duty of supervision.

6. Corporate executives, corporate officials, and, where applicable, corporate owners should be held criminally liable for moral complicity on the basis of any kind of psychological contribution to an international crime (e.g. ordering, instigating, giving advice, encouraging, promising reward, etc.), provided that the minimum requirements of the complicit act are met, both in terms of *actus reus* and *mens rea*.

7. In accordance with the principle of personal criminal liability, corporate executives, corporate officials, and, where applicable, corporate owners, may be held criminally liable for merely being a "bystander" (such as being present at and/or not withdrawing from the scene of the crime) provided that such conduct meets the requirements for moral complicity or for liability for omission.

8. Negligent acts of corporate executives, corporate officials, and, where applicable, corporate owners fall under the general rules on complicity adopted by every national legal order. Negligent complicity of individuals in international crimes, which are only punishable as intentional offences, is not admitted.

9. Where corporate executives, corporate officials, and, where applicable, corporate owners have control over the organized system of power, they may be held criminally liable on the basis of indirect perpetration provided that the principle of individual culpability is fully respected.

10 Corporate executives, corporate officials, and, where applicable, corporate owners may be held criminally liable, according to international law and national legal systems, for taking part in a criminal association or in a conspiracy aimed at committing international crimes.

⁵ Seventh International Congress of Penal Law Athens, 26 September – 2 October 1957

⁶ Fourteenth International Congress of Penal Law Vienna, 2 – 7 October 1989

⁷ Eighteenth International congress of penal law, Istanbul, 20 - 27 September 2009

11. Joint criminal enterprise, as defined by international criminal case law and in particular its extended form, may only be applied to corporate executives, corporate officials, and, where applicable, corporate owners in accordance with the general principles of criminal law, in particular the culpability principle.
12. Superior responsibility for international crimes, as defined by international law, may be applied to corporate executives, corporate officials, and, where applicable, corporate owners provided that they had effective control over their employees or other subordinates and that other requirements are met.
13. Corporate compliance programs and rules on corporate governance should include the obligation to respect international human rights standards. For determining the criminal liability of corporate executives, corporate officials, and, where applicable, corporate owners for their involvement in international crimes, their legal duties should be defined in legislation and further detailed in those programs and rules in accordance with national law.
14. Corporate functions and powers that exist *de facto* should be taken into account in order to identify liable individuals.
15. Delegation of power within a corporation is admitted as a tool capable of attributing criminal liability, provided that certain conditions are met, for example the delegation was partial, precise, specific, and necessary to run the business, and the delegates were in the position to perform the activities transferred to them.