

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

Section IV: Prosecuting corporations for violations of International Criminal Law: jurisdictional issues

Preamble

Accepting that companies have an important part to play in global efforts to promote human rights and that their business activities may give rise to conduct that is prohibited under international human rights law and domestic criminal law;

Acknowledging the particular challenges to corporate accountability in cross-border contexts due to *inter alia* global economic inequalities, disparities in state institutional capacity, the use of supply chains, distribution chains, and corporate arrangements involving different legal entities in business operations;

Considering that states take different approaches to the prevention and suppression of human rights abuses in business situations and that those measures may take the form of criminal, administrative, and civil laws, as well as support for soft law or self-regulation initiatives;

Affirming the general principle of territoriality, such that states may assert jurisdiction over conduct that is perpetrated in their territories or that result in harm in their territories, *but also affirming* that active personality is a widely recognized basis for jurisdiction and that passive personality and universal jurisdiction are regarded as appropriate to certain offences in international and domestic criminal law;

Stressing that any state's ability to ensure respect for human rights in business operations will depend, in part, on its domestic corporate and/or criminal laws and that these legal frameworks may need revision, especially with respect to the issue of jurisdiction;

Observing that human rights abuses in cross-border business situations do not typically involve positive conflicts of jurisdiction and *asserting* that states must strive to prevent negative conflicts, as well as disproportionate or arbitrary punishment of alleged corporate offenders;

Reiterating that states have positive obligations under international human rights law to ensure that victims of serious human rights violations have access to effective remedies and that these duties affect resources allocation decisions, investigative and prosecutorial discretions, and the handling of requests for mutual legal assistance;

Noting the importance of international initiatives in this area, including the United Nations' *Guiding Principles on Business and Human Rights* (2011),¹ the *OECD Guidelines for Multinational Enterprises* (2011),² the EU Directive 2014/95/EU,³ and the *Corporate Crimes Principles* of Amnesty International and the International Corporate Accountability Roundtable (2016).⁴

Recalling the resolutions of previous AIDP Congresses, in particular, on international crimes and domestic criminal law,⁵ concurrent criminal jurisdiction, and universal jurisdiction;⁶

Adopts the following resolutions:

1. States must ensure that their legal frameworks enable the investigation and prosecution of human rights abuses that occur in a company's business activity, in its supply or distribution chain, and in its other business arrangement that involve multiple legal entities ("corporate human rights abuses").
2. Substantive and procedural criminal laws must be used to enhance respect for international human rights law and to contribute to holding companies accountable for corporate human rights abuses. Therefore, amongst other things, states must:
 - a. define offences and corporate criminal liability rules in a manner that enables effective investigation, prosecution, and adjudication of corporate human rights abuses;
 - b. consider making corporate liability conditional on factors such as control, negligence, or lack of due diligence;

¹ <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

² <<http://mneguidelines.oecd.org/annualreportsontheguidelines.htm>>.

³ OJ L 330, 15 November 2014.

⁴ <http://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf>

⁵ Fourteenth International Congress of Penal Law, Vienna, 2–7 October 1989.

⁶ Third International Congress of Penal Law, Palermo, 3–8 April 1933 and Thirteenth International Congress of Penal Law, Cairo, 1–7 October 1984; Eighteenth International Congress of Penal Law, Istanbul, 20–27 September 2009.

- c. define concepts of corporate liability so as to have regard to the economic realities of business operations and not just the legal principles associated with incorporation (e.g., separate legal personality and limited liability where in fact hierarchical control or de facto dependence shape a corporate relationship); and
 - d. encourage their competent investigative and prosecutorial authorities to exercise discretions with a view to fulfilling international obligations to protect human rights and to provide an effective remedy for victims of corporate human rights abuses.
3. States must define their jurisdictional rules in a way that enables companies to be held accountable for corporate human rights abuses.
 4. In pursuit Resolution 3, states must assert jurisdiction over the investigation and prosecution of corporate human rights abuses when their territory was the place of the occurrence of harm as well as when it was the place of the occurrence of the wrongful conduct, in whole or in part.
 5. To make full use of the territoriality principle, states must:
 - a. assert jurisdiction over the investigation and prosecution of corporate conduct where a company acted or should have acted in its territory, including by being negligent in its organization and omitting to control others; and
 - b. recognize that the relevant links to its jurisdiction may include the place where an agent was physically present at the time of the conduct or where the center of main interest or seat of relevant companies are, depending on the rules for attributing guilt to corporations in its domestic law.
 6. States must assert active personality jurisdiction over companies incorporated under their domestic laws as well as over companies whose center of main interest (e.g., their principal place of business) is in their territories.
 7. States whose nationals or residents have been harmed by corporate human rights abuses must assert passive personality jurisdiction if those victims would otherwise be without an effective remedy (e.g., because another state with jurisdiction is unable or unwilling to act).
 8. States that assert universal jurisdiction must extend this ground of jurisdiction to corporations involved in offences that correspond to the most serious human rights abuses. Where states make the exercise of universal jurisdiction conditional on other factors (e.g., the presence of the suspect in their territories), they must interpret those conditions with a view to ensuring corporate accountability.
 9. States have positive obligations under international human rights law to provide victims of human rights violations with legal assistance, and a remedy. In pursuit of this obligation, states must:
 - a. assist each other in their efforts to investigate and prosecute companies for alleged corporate human rights abuses, for instance, by obtaining and providing evidence and technical assistance;
 - b. commit adequate resources for the timely investigation and prosecution of alleged corporate human rights abuses; and
 - c. ensure that they administer justice in such cases in a manner that is transparent, accessible, and accountable, including to victims.
 10. Further to Resolution 9 and so as to ensure maximum access to remedies, states must:
 - a. provide an effective procedure by which victims can recover reparations for corporate human rights abuses; and
 - b. use their enforcement jurisdiction to the maximum extent possible in keeping with rights to due process, to enable victims to recover under civil, criminal, or administrative judgments or orders by other states.