Third AIDP Symposium for Young Penalists

Stijn Lamberigts

Abstract The Third AIDP YP Symposium was dedicated to corporate criminal liability from an international and problem oriented perspective. This chapter contains the minutes of the Symposium as redacted by Stijn Lamberigts.

1 Introduction

The Third AIDP YP Symposium was dedicated to corporate criminal liability (CCL) from an international and problem oriented perspective. It was hosted jointly by the Chair for Criminal Law, Criminal Procedure and Economic Crimes at the University of Munich (*Prof. Dr. Joachim Vogel*) and by the German National Group of the AIDP. It was organized by *Dominik Brodowski* and *Manuel Espinoza de los Monteros de la Parra* and supported by Roxin Alliance. The symposium was composed of six panels addressing the following topics: Regulatory Options in CCL, Attributing Criminal Liability to Corporations, Corporate Crimes, Criminal Compliance and Corporate Criminal Procedure, Transnational CCL and Psychology, Sociology and Economics of CCL. 30 speakers from 15 countries contributed to the symposium. By selecting both the topics and referents the symposium responded to the call made by *Prof. Dr. Joachim Vogel* (Germany) in his welcoming words to view CCL as only one option among several options to suppress criminal behaviour in the economic sphere. Thereby *Vogel* made particular reference to the German situation, where a model that he referred to as a hybrid system is in place. Although for corporations the sanctions are administrative, *Vogel* stressed that on the procedural level a lot of elements of criminal proceedings can be found.

S. Lamberigts (✉)
European Criminal Law, University of Luxembourg, Luxembourg, Luxembourg
e-mail: stijn.lamberigts@uni.lu

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Indeed, the topic of the Symposium was of particular importance for Germany. As *Prof. Dr. Stefan Korioth* (Germany) stressed in his welcoming words, at the time of the symposium the Federal Minister of Justice and the 16 Ministers of Justice of the *Länder* were discussing a draft statute on the topic of CCL that could end *societas delinquere non potest* in Germany.

2 Keynote Speech

Indeed, in the era of globalised economies not only individual actors (natural persons) but also corporations must face criminal liability for the harm they cause to internationally recognized legal interests. *Prof. Dr. Dr. h.c. mult. Klaus Tiedemann* (Germany) emphasized in his keynote speech[1] that the idea of CCL is not new, already a large number of EU Member States have introduced CCL into their criminal justice systems.

Tiedemann started with a historical overview, indicating that historically administrative sanctions were mostly used in central Europe and their root is to be found in police fines, already known in the nineteenth century, notably for tax violations. The second track to punishment in criminal law is incapacitation of offenders who are not capable of contracting guilt. He then referred to incapacitation for offenders who are not capable of contracting guilt, including confiscation of proceeds of crime which has been seen as an appropriate tool in the fight against corporate crime since the AIDP conference in Bucharest in 1929. He went on by highlighting the importance of administrative sanctions in the twentieth century, their development into a *droit administratif pénal* which is meanwhile recognized by the ECtHR as punishment at least in a broader sense. Numerous European countries have gone much further over the last two decades and introduced a genuine criminal liability for legal persons.

Tiedemann pointed out that it is primarily a criminal policy choice whether sanctions similar to criminal punishment suffice or whether the legislator decides for introducing proper criminal punishment against corporations. In that context, the EU policy requires proportionate, effective and dissuasive sanctions. According to *Tiedemann* CCL proper is to be regarded as more effective compared to administrative fines, if there are also explicit provisions as to the proceedings against legal persons. *Tiedemann* highlighted that as long as empirical evidence is missing, an effective system of administrative non-criminal sanctions cannot be considered as in violation of EU law. He stressed that proceedings or at least the final sentence are to be public.

Tiedemann extensively addressed the capacity of legal persons to act and the principle of guilt as well as the different models that are used. For the German criminal law reform, he proposed a mixed approach which should aim at

[1] Tiedemann, in this volume, pp. 11ff.

introducing criminal liability of corporations. Such liability should be based on vicarious liability by attributing acts and *mens rea* of bodies and legal representatives of corporations. Crimes committed by other employees may be attributed to the corporation based on the collective element of insufficient organization or oversight. However, this attribution should end when a corporation has taken all necessary and reasonable measures to prevent crime.

2.1 Discussion

The subsequent discussion focused on the question whether proceedings against corporations should be public, a strategy defended by *Tiedemann*. *Dr. Klaus Moosmayer* (Germany) confirmed that he would not be against a unified system of publication at a central level. He stressed the importance of a fair trial and he also defended the concept of self-cleaning, which allows from delisting a company whose name has been published, after it has taken the right compliance measures. *Vogel* then questioned *Tiedemann* about the public nature of trials for corporations. *Tiedemann* agreed on a central system of publication and a fair approach. He then stressed that he indeed wants a public trial, at least for severe cases. Questioned again by *Vogel* on his view on the public character of the proceedings themselves and not merely on the publication system, *Moosmayer* elaborated on a case where proceedings against natural persons were combined with administrative fines for a corporation. He pointed to the fact that individuals involved in white collar crime often aim at an out of court settlement with the authorities. He had difficulties accepting that individuals on the one hand would make a deal and avoid a public trial, whereas corporations would face a public trial. *Tiedemann* then added that he wants both parties, natural and legal persons, to be treated equally. A question was then addressed to *Tiedemann* on the effects of the economic crisis on the introduction of CCL. According to him, the issue of the economic crisis falls outside the scope of the general picture that he elaborated on. Banks would be included in his model, but there are some additional aspects. He referred to the Austrian law which holds provisions on banks that require help from the state.

3 Regulatory Options in CCL

The first panel dealt with the different options available for the regulation of CCL and was chaired by *Alexander Schemmel* (Germany). *Dr. Marc Engelhart* (Germany) elaborated on the different models that can be used to regulate CCL.[2] He started off with a brief overview of the different instruments that have played a

[2] See also Engelhart, in this volume, pp. 53ff.

role in the field of CCL and the increasing number of states in Europe that have implemented it since the beginning of the 1990s, stressing the importance of the Second Protocol to the PIF-Convention[3] and its attention to leading positions within the legal person. Next, he elaborated on problems that have to be addressed in general, such as, for example, the element of striking deals with the prosecuting authorities, and the topic of compliance and its effect on liability, sanctions and proceedings against corporations, using the example of the UK Bribery Act which provides that companies are not liable when adequate procedures exist to prevent employees from bribing. He concluded with new perspectives in regulation, such as the interplay between states and companies in this regard. *Dr. Devrim Aydın* (Turkey) then addressed the question whether there are suitable sanctions for new forms of corporate offences.[4] He recalled the main arguments against CCL, such as the idea that they cannot have *mens rea*. He went on by addressing the use of fines, thereby referring to the German system of administrative fines. *Aydın* then highlighted the risks of the use of fines and stressed the importance of proportionality, in order to avoid making unnecessary victims such as loss of employment within the companies due to the fines. He then addressed the other sanctions available, such as withdrawing licenses and confiscation. The panel topic was then approached from a practical point of view by *Dr. Wendy De Bondt* (Belgium), who dealt with public procurement and exclusion grounds related to prior convictions and more particularly those related to prior convictions of the candidate for participation in a criminal organization, fraud, corruption or money laundering.[5] She referred to the different techniques which are being used in the field, public procurement law on the one hand and criminal law on the other hand, as well as to the diversity that exists throughout the different states with regard to the behaviour that is criminalized. *Thomas Richter* (Germany) examined the importance of the new German law on criminal liability of banking and insurance executives for the topic of CCL.[6] His contribution showed the impact of events such as the recent economic crisis on economic and financial criminal law. In the aftermath of the saving of several banks, the government considered the current legislation to be insufficient in regard to mismanagement by bank executives. The initial draft contained provisions on management duties, combined with criminal sanctions for senior managers who fail to comply with these duties if the bank's viability would be endangered. Due to extensive criticism, for example on the vagueness of the draft, it has been amended before being adopted and the possibility that managers will face criminal liability has been reduced. One of the relevant elements of this act for the issue of CCL was, according to *Richter*, the criminal liability for mismanagement which shows a tendency towards strict criminal liability. Lastly

[3] Second Protocol to the Convention on the protection of the European Communities' financial interests, [1997] OJ C 221/12.

[4] See also Aydın, in this volume, pp. 311ff.

[5] See also De Bondt, in this volume, pp. 297ff.

[6] See also Richter, in this volume, pp. 321ff.

the topic was approached by *Yasmin Van Damme* (Belgium), who dealt with human trafficking and labour exploitations.[7] She emphasised the importance of globalization and the means that are being used in the field, including demand reduction. She mainly dealt with the criminal law approach, although she indicated that other means such as joint liability and self-regulation are available options, too. The EU suggestion to establish as an offence the use of services which are objects of exploitation and the problems that come with this approach, in particular the grey zone that exists between what is voluntary and coerced, and the issue of *mens rea*. Then she went on by stressing the scattered landscape that exists with regard to CCL and the fact that the Member States are left free to use a criminal, administrative and or civil liability. A crucial mechanism that had to be found, is how to distinguish *bonafide* and *malafide* subcontractors as well as how to establish guilty knowledge.

3.1 Discussion

The debate after the session was opened by *Tiedemann* who asked *Richter* to comment on the statement that no banker will go to jail on the basis of the new German law. *Tiedemann* described it as symbolic law-making. According to *Richter*, it makes a huge difference who is liable, a corporation or an individual. There is a big difference between someone facing the risk of going to jail, or a corporation which risks losing some money. *Richter* then agreed with *Tiedemann* that it is symbolic law-making, highlighting as well that the prosecutors and judges are not able to deal with the management duties. He then continued stating that he thinks the law will be effective since there is the prospect of someone who could go to jail.

Vogel then asked *Engelhart* to elaborate on the criminal practice in the European Union and the German practice with regard to corporations. *Engelhart* admitted that the comparative studies are limited in this regard. According to them, there are some small puzzle pieces available, which are not so representative, since they are often highly symbolic, such as the UK case on the Herald of Free Enterprise. In practice he thinks that prosecutors often prefer to focus on individuals instead of corporations. *Tiedemann* then added that in Sweden there have been a lot of prosecutions against corporations, and in France there have been 8–10 convictions over the last decade.

Then the question was raised whether—given the limited results of the requirement of effective, proportionate and dissuasive sanctions—it is reasonable to try it with criminal sanctions. *Engelhart* considered these vague terms not appropriate. According to him, the term "criminal" might lose importance, whereas the procedure and the protecting mechanisms will gain importance.

[7] See also Van Damme and Vermeulen, in this volume, pp. 171ff.

Aydın was then asked to give his view on whether he finds it reasonable to say that depending on your concept of guilt you might be able to fit legal persons in. According to *Aydın*, crimes can be committed to the benefit of a corporation, or a corporation might be used for committing offences. He further focused on corporations being used as an instrument to commit offences.

The following question dealt with the situation in Spain where currently dozens of bankers are facing criminal sanctions in the aftermath of the financial crisis, often on the basis of breach of fiduciary duties. *Richter* recalled that the previous legislation was insufficient since the management duties were not enshrined in a formal law, but merely in regulatory guidelines which did not suffice to convict someone on the basis of "*Untreue*".

De Bondt was then asked how the information exchange takes place in practice. She admitted that this is an important issue. The documents that are provided are often too vague, since they do not provide information on the exact content of the underlying offence. An EU wide system is currently lacking.

4 Invited Lecture

Dr. Klaus Moosmayer (Germany) addressed the topic of CCL from a practitioner's point and elaborated on the Siemens case. The crucial importance of a good reputation for companies was stressed throughout the lecture, as well as the impact of investigations on the corporations and its stakeholders. *Moosmayer* explained the new internal control system used by Siemens. This new system, applied by 550 full time compliance officers, consists of three steps: prevent, detect and respond. Having an effective control system has the consequence that people who are very successful in the company may be fired if they violated compliance rules. One of the challenges of that system is compliance fatigue, which means that at some point people have had it with compliance. Siemens uses four questions that should help employees in their daily activities as far as compliance is concerned: Is it the right thing for Siemens? Is it consistent with Siemens' and my core values? Is it legal? And is it something I am willing to be held accountable for? Some interesting suggestions were launched, such as unified legal standards that incentivize companies to implement and maintain effective compliance systems should be envisaged and corporate leniency regulations should be extended beyond antitrust cases to, for example, cases of detected corruption where it is voluntarily disclosed.

4.1 Discussion

The first question during the debate was whether companies that have adopted an extensive range of measures to prevent crime in the corporation should still be prosecuted in the case of wrongdoing at the highest level. According to *Tiedemann*,

prosecution should not be excluded in those cases. He was supported by *Vogel* on this point. Asked for his opinion on the introduction of CCL in Germany by *Vogel*, *Moosmayer* answered that he thought that it is coming and he added that the importance of incentives should be taken into account. In response to an additional question, *Moosmayer* admitted that the current system in Germany is indeed no longer adequate. *Moosmayer* made it very clear in his answer on whistle-blowers that he is against the idea of giving them bounties, although he recognized that whistle-blowers are needed. *Engelhart* then asked *Moosmayer* how effectiveness is measured at Siemens with regard to compliance. In his answer, *Moosmayer* emphasised the importance of input of the employees in this regard. Therefore the input of every employee is asked twice a year. The final question that was addressed to *Moosmayer* dealt with the impact of local regulations on Siemens' compliance system. *Moosmayer* explained that Siemens aims at global standards, but where necessary, local elements are taken into account.

5 Attributing Criminal Liability to Corporations

The first session on Thursday, chaired by *Prof. Dr. Holger Matt*, dealt with the attribution of CCL to corporations. *Dr. Anna Salvina Valenzano* offered a comparative view on the triggering persons, thereby distinguishing three groups of persons.[8] The first system is the one that focuses on the notion of the "leading position". Then she elaborated on the two-tier system, which includes both the offences committed by persons in a leading position as well as those offences committed by a subordinate, provided that there is a breach of the duties of supervision by a person in a leading position. The second approach can in principle be considered as an EU statutory model. The last approach which was distinguished also includes those offences committed by third persons who are outside of the organizational structure of the legal person. She concluded by presenting a model that incorporates the three different approaches. *Andrea Lehner* (Austria) dealt with the Austrian model of attributing criminal liability to legal entities,[9] which is the implementation of EU instruments such as the Second Protocol to the PIF Convention.[10] The Austrian model was considered to combine elements of both an attribution model and direct liability. The distinction made between decision-makers and staff members can be traced back to the Second Protocol. Then the legal framework of CCL in Italy, in particular with regard to the issue of unintentional crime was addressed by *Camilla Cravetto* and *Emanuele Zanalda* (Italy) who considered that introduction of corporate manslaughter poses particular problems

[8] See Valenzano, in this volume, pp. 95ff.

[9] See also Lehner, in this volume, pp. 79ff.

[10] Second Protocol to the Convention on the protection of the European Communities' financial interests, [1997] OJ C 221/12.

with the interest or advantage test that is used in Italy.[11] One can only conclude that several questions still remain unanswered, including questions of a constitutional nature. *Emmanuelle De Bock* (Belgium) dealt with specific elements of the Belgian approach to CCL and she started off by giving a short historic overview of the Belgian approach towards CCL, which was introduced in 1999. She then described the very broad field of application of Article 5 of the Belgian Criminal Code which stipulates CCL. This approach is not restricted to certain offences and it is, according to *De Bock*, an autonomous criminal liability. The main element of her contribution was the Belgian "décumul" rule which states that whenever a crime is committed by a corporation together with an identified natural person, only one entity can be held criminally responsible, namely the one whose fault is the most serious. The exception to this rule is that where the natural person commits the offence willingly and knowingly, the "décumul" cannot be applied. She then considered that besides the lack of rationale behind this "décumul" rule, determining the most serious fault in practices is hard.[12] *Danielle Soares Delgado Campos* (Germany) gave an overview of CCL in Brazil, which is non-existent, apart from some exceptions. *Campos* assessed the prosecution of corporations, as well as the sanctions imposed on them to be rare. She also compared the diverging approaches of the Superior Court of Justice which unlike the Supreme Federal Court solely accepts criminal liability of companies for environmental crimes insofar as the criminal liability of the individual is at stake as well.

5.1 Discussion

The discussion was opened by *Richter* who inquired to what extent the Krupp case concerned also the criminal liability of individuals. *Zanalda* confirmed that a manager was indeed sentenced to 11 years of imprisonment, even if the court of appeal considered that there was no intention but negligence. *Cravetto* stressed the political importance of this case. *Dr. Avital Mentovich* (USA) then inquired what punishments are available for corporations. *Lehner* explained that in Austria the available sanctions are fines of a maximum of 1.8 million Euro. *Valenzano* mentioned that in Italy the available sanctions are interdictions and fines. According to her, in particular the interdictions that can be of a temporary or final nature are crucial. In the latter case, this can be considered as a death sentence. *Campos* stated that Brazil has several sanctions available such as fines, interdictions, exclusion from government contracts and exclusion from government grants. *De Bock* referred to article 7 *bis* of the Belgian Criminal Code which has an extensive range of sanctions such as fines, limitation of corporate activities, publicity sanctions and sanctions terminating the legal personality. *Vogel* then expressed his

[11] See also Cravetto and Zanalda, in this volume, pp. 109ff.

[12] See also De Bock, in this volume, pp. 87ff.

concern about attribution of criminal liability to corporations where no individual perpetrator can be found. He inquired how offences that take place within the company such as mobbing or sexual harassment should be dealt with, and asked whether they could be used as triggering offences. *De Bock* mentioned that the problem is shifted in Belgium and a lot of work is left to the judges. As for the second aspect, she recalled that Belgium has no limitation with regard to the triggering offences. *Lehner* recalled that in Austria the identification of a specific individual is not always required, but there is still an ongoing discussion on that topic. As for the second element she mentioned that a conviction of the corporation is not excluded. *Valenzano* considered that with regard to the second issue that if the offence is committed in the exclusive interest of the natural person, then the corporation cannot be held liable. *Cravetto* mentioned that with regard to certain employees, there is a reversed burden of proof, and that the closed list system that Italy uses does not allow for liability of corporations for the two offences mentioned by *Vogel*.

6 Corporate Crimes

Vogel, as chairman, opened this session by giving an overview of the offences that are likely to be committed by corporations, such as tax fraud, illegal employment and market rigging. He emphasized that a lot of research must be done in this field since there is a lack of data on the topic of CCL. *Dr. Anna Błachino-Parzych* (Poland) dealt with market manipulation recalling its risks for the capital markets and the market participants. Capital markets were compared with a game and she stressed the importance of confidence in the markets of the market participants. An overview of the relevant provisions of the Market Abuse Directive (MAD) was then given. The concept of the "artificial price", which is the core element of price manipulation, was treated in particular detail. A more subjective approach to that concept instead of the objective approach in the MAD was proposed. She elaborated on the new proposals that have been launched by the European Union, the regulation on insider dealing and market manipulation and the directive on criminal sanctions.[13] *Axel-Dirk Blumenberg* (Germany) also looked into market manipulation. He recalled that market manipulation is not only about stock prices, but even more importantly about market integrity and investor confidence. He emphasized that it is a challenge to keep up with new technologies, such as computer orders of stock. He then distinguished three types of manipulation: trade based, information based and action based manipulation. The Libor scandal has shown that indices can be manipulated as well. In his conclusion he mentioned the failure of the previous supervision system and the need to take the core principles of criminal law into account. *Prof. Dr. Eduardo Saad-Diniz* (Brazil) discussed the new Brazilian

[13] See also Blachnio-Parzych, in this volume, pp. 145ff.

legislation on money laundering.[14] He first made some remarks about the culture of CCL, including the international pressure for cooperation in criminal matters. His contribution provided insight in the different stages of Brazilian money laundering legislation and its relation to connected offences. The first stage dealt with the fight against narcotics. This scope was widened in the second phase and included, for example, arms trafficking. The third generation suppressed the catalogue approach. *Patricio Nicolas Sabadini* (Argentina) gave a critical overview of the progress and the regressions that have been made in the field of money laundering in Argentina. *Sabadini's* contribution made it clear that the influence of international bodies such as FATF-GAFI and the threat of an international sanction against Argentina should not be underestimated. *Dr. Jacqueline Hellman* (Spain) defended the introduction of ecocide as an offence in international criminal justice.[15] According to her, after damage has been done to the environment—for example by an oil spill—governments often neglect to take the necessary action, driven by economic motives. *Hellman* considered the introduction of this offence as a good instrument to prevent companies from escaping so easily. Given the power of certain multinational companies, she deemed cooperation between as many states as possible necessary.

6.1 Discussion

Before opening the debate, *Vogel* pointed out that international criminal law was traditionally of a customary nature. The first question on the interests protected by ecocide was addressed to *Hellman*. Along with this question *Hellman* was also asked whether criminal law is the way to be followed, also taking into account the very limited number of ICC judgments. *Hellman* considered that the interests of the people living in the region that was harmed are also covered. So, it is about protecting the environment and the rights of the people who are living there. With regard to the second question, she considered criminal law to be much more effective. *Lynn Verrydt* (Belgium) then addressed the concept "unable or unwilling" in international criminal law and its impact on the number of national cases. She assumed that no national court would like to be considered to be unable or unwilling to handle ecocide cases. *Hellman* agreed that countries will indeed be encouraged to deal with the issue. Another question was then addressed to *Hellman* how it will be implemented in practice, since it seems that states are reluctant to introduce new crimes in international criminal law. *Hellman* agreed that there is indeed reluctance to deal with ecocide in international criminal law. She mentioned that the UN has in 2012 encouraged states to have meetings on this topic.

[14] See also Saad-Diniz, in this volume, pp. 135ff.

[15] See also Hellman, in this volume, pp. 273ff.

7 Criminal Compliance and Corporate Criminal Procedure

The session on Criminal Compliance and Corporate Criminal Procedure was chaired by *Prof. Dr. Petra Wittig* (Germany). *Dr. Radha Ivory* (Switzerland) presented collective action as a new way to address CCL. In her opinion, many states have nowadays a sort of liability for corporations, either criminal or administrative. *Ivory* considered these rules to converge around due diligence, a notion which she described as: companies should only be held liable for crimes that they failed to prevent by taking reasonable steps to prevent. She presented collective action as a form of self-regulation by using the prisoner's dilemma. Due to an increased level of information between competitors it is aimed at reducing the opportunities and incentives for individual wrongdoing. Some issues that pose a threat to the use of collective action are antitrust law and the risk that people who are not part of collective action undermine it. *Dr. Nicola Selvaggi* (Italy) shed light on compliance and its adequacy from a comparative point of view. *Selvaggi* considered it necessary to avoid a *probatio diabolica* with regard to the adequacy of compliance programs. Among the elements that he considered to be relevant for the evaluation of a program's adequacy are risk assessment, finding a way to manage financial resources in order to prevent the commission of crimes and the introduction of a disciplinary system adequate to sanction the violations of compliance rules. *Jordi Gimeno Beviá* (Spain) treated compliance programs as evidence in the framework of criminal cases.[16] *Gimeno Beviá* described the situation in the US, where most cases are concluded prior to a trial through plea bargaining. He then compared the US and the European approach towards the burden of proof, including the risk of contempt of court. *Prof. Ana María Neira Pena* (Spain) addressed the question whether CCL is a tool or an obstacle to prosecution.[17] The first part of her contribution addressed the difficulties of corporate prosecutions. These difficulties include the economic power of the companies and the fact that concealment of individual responsibility is facilitated by legal persons. She compared some elements of the approaches adopted in the US and in Europe. She defended both guarantees for legal persons and the expansion of the possibilities to reach agreed solutions. She concluded that substantial differences between the European and the American procedural systems may cause CCL to become an obstacle for criminal investigations in Europe. *Dominik Brodowski* (Germany) presented the topic of procedural rights for corporations in criminal trials, taking into account constitutional law and human rights law and the limitations they pose.[18] *Brodowski* continued by examining the necessity of criminal trials. He concluded that it all depends on the aim and it is in those cases where the behaviour has to be regulated

[16] See also Gimeno Beviá, in this volume, pp. 227ff.

[17] See also Neira Pena, in this volume, pp. 197ff.

[18] See also Brodowski, in this volume, pp. 211ff.

and where deterrence is needed that criminal trials become involved. Forfeiture and incapacitation can be achieved by different means. *Brodowski* considered that two elements distinguish the procedural rights of corporations from the ones of individuals: the fact that they are not amplified by article 5 ECHR and second, a 2006 ECtHR case (73053/01) that dealt with tax surcharges, which seemed to allow for less stringent standards where the hard core of criminal law is not involved. *Brodowski* raised the question for whom the procedural rights are and who is protected. He also presented several reasons why more procedural rights are better. One of them is the argument that more limited rights for corporations might in the end lead to a reduction of the rights of natural persons afterwards.

7.1 Discussion

In the subsequent debate, *Richter* considered that more rights for companies might lead to less rights for individuals, therefore disagreeing with *Brodowski*'*s* argument. He inquired which rights *Brodowski* had in mind. According to *Brodowski* it could work both ways and he considered a full protection desirable, although he seemed to be less sure with regard to *nemo tenetur*, as he also considered that *nemo tenetur* is not absolute. He further added that procedural rights also have to be provided in civil and administrative proceedings. *Ivory* then received a question on the prisoner's dilemma and incentives. She made it clear that incentives, just like enforcement and punishment come in various forms. On a question about empirical evidence, she admitted that this was limited.

8 Transnational CCL

The session on transnational CCL was chaired by *Prof. Dr. Helmut Satzger*. *Prof. Dr. Yurika Ishii* (Japan) elaborated on the enforcement of a financial crime in a foreign country.[19] She dealt with Deferred Prosecution Agreements, which, according to her, raise issues of transparency and legitimacy as well as they create a risk for international conflicts if used excessively. This topic is, according to her, influenced by the rule that a state may not exercise its sovereign rights in another state's territory without the latter consenting. *Dr. Anne Schneider* (Germany) dealt with CCL and conflicts of jurisdiction.[20] She distinguished the jurisdiction to enforce, to prescribe and to adjudicate. She also examined the different principles used in the European Union. *Aikaterini Tzouma* (Germany) presented the topic of *ne bis in idem*. After a general explanation of the principle, she looked into the

[19] See also Ishii, in this volume, pp. 237ff.

[20] See also Schneider, in this volume, pp. 249ff.

different relevant instruments, such as Article 54 CISA, Article 50 of the Charter of Fundamental Rights and the 7th protocol to the ECHR. Subsequently she dealt with the application of the principle in EU competition law after the 2003 reform.[21] *Verrydt* presented her point of view on the question whether the ICC's mandate should be extended to include legal persons.[22] This would be desirable, according to her, because of the numerous cases where corporations were involved, and because of its advantages compared to existing liability regimes. The host state—where the offence takes place—has, according to *Verrydt*, often an underdeveloped legal system, and the home state will not always intervene when extra-territorial human rights abuses by domestic corporations are concerned. She concluded that an amendment of the ICC's Statute is currently not feasible because of a lack of an international standard. *Dr. Ahmed Khalifa* (Egypt) shared his thoughts on criminal responsibility of corporations for international crimes. For him one of the leading contemporary examples of this issue are private security companies. Indirect involvement is according to *Khalifa* an important issue. He admitted that in international criminal law there is no CCL. He stressed that corporations have been prosecuted sometimes in national courts. Customary status is however still lacking. The main track that should be followed now is national prosecution, according to *Khalifa*.

8.1 Discussion

The first question addressed to *Schneider* dealt with the centre of main interest. The problem, according to her, is particularly strong in the case of letterbox companies. *Schneider* was also asked how to deal with situations where offences were committed in one state and the state where the company is registered would be competent as well on state of the active personality. She would in such cases prefer to have the case dealt with by the country where the wrongful conduct took place. Then *Khalifa* was asked for his opinion on human rights violations by companies. A line has to be drawn between human rights violations which can be very serious and whether it can be qualified as international crimes, which will not necessarily be the case. He added that a national interest to prosecute will not always be present to prosecute the case. *Verrydt* added that qualifying it as a crime against humanity will often be difficult because of the requirement of a widespread attack. The following question dealt with the desire for more enforcement in the field of international criminal law. *Khalifa* stated that the element of interest of the state is crucial in this regard and the importance of patience.

[21] See also Tzouma, in this volume, pp. 261ff.

[22] See also Verrydt, in this volume, pp. 281ff.

9 Psychology, Sociology and Economics of CCL

The final session on Psychology, Sociology and Economics of CCL was chaired by *Prof. Dr. William S. Laufer*. *Jamie-Lee Campbell's* (Germany) and *Anja S. Göritz'* (Germany) contribution dealt with corruption as a matter of organizational culture. According to them, an organizational culture which is corrupt helps employees to rationalize and explain their criminal behaviour and consider it as good behaviour. The organizational culture did indeed have an influence on the amount of corruption. *Dr. Avital Mentovich* (USA) elaborated on punishing collective entities.[23] She recalled that corporations are seen as separate legal entities at various levels: at first with regard to limited financial liability, later also from the point of view of constitutional rights and now often also with regard to criminal liability. She then made it clear that attributing intent to corporations is rather difficult. According to her, less punishment is given to corporations in the end. *Mentovich* considered that people are less offended when the rights of corporations are violated than when an individual's rights are violated. She supported changing the burden of proof on the topic of intent. *Mark Hornman* (The Netherlands) dealt with the question whether an organization's structure should influence corporate and individual criminal liability. In the first part of his presentation he gave a brief overview of CCL and criminal liability of leading officials in the Dutch legal framework. He linked the aforementioned question to Mintzberg's typologies and he presented three basic forms: the simple structure, the machine bureaucracy and the professional bureaucracy. He concluded that those typologies could be useful in fine-tuning individual and corporate criminal liability. This should lead to a more tailor-made approach. *Patrick Bernau* (Germany) approached CCL from an economic perspective. A substantial part of his presentation dealt with the process of how decisions are made. *Bernau* presented the principal agent model in which three elements are crucial: the principal, the agent and the own motivation. He stressed that employees have their own motivation and often they commit wrongdoings for their own benefit and not for the benefit of the company. He cited the Kerviel case in France to support this. He also elaborated on the incidence of costs and he made it clear that attention should be paid to who is paying in the end for the wrongdoing.[24] *Sherbir Panag* (India) presented a comparative analysis of administrative sanctions as a tool to fight corruption, and more specifically blacklisting and debarment. He distinguished pre-trial and post-conviction use of these instruments. He stressed the importance of the principle of proportionality and the need to look into it.

[23] See also Mentovich and Cerf, in this volume, pp. 33ff.

[24] See also Bernau, in this volume, pp. 47ff.

9.1 Discussion

Laufer asked *Campbell* for her view on blameworthiness. She answered that people who work in an organizational structure which is not corrupt are more blameworthy if they give bribes than those who do it and work in a corrupt structure. *Laufer* wanted to know whether *Hornman* was suggesting that small businesses get trials and bigger ones do not. *Hornman* confirmed that particularly small businesses get convicted. *Laufer* stressed the cost of criminal law and the lack of attention that is spent on analysing who is harmed by the application of criminal law.

10 Concluding Remarks

In his concluding remarks, *Vogel* looked into the questions that are still open for future research. He identified four types of studies that should be conducted in the future: empirical studies, criminal policy studies, constitutional law studies and studies about CCL.

With regard to empirical studies, he stressed the lack of data on corporate crime: How many offences are reported? How many per cent of a sector is criminal? What are the typical criminal corporations (big ones? Small ones? Old ones or new ones?)? In relation to criminal policy, he highlighted that we should realize the link between criminal and economic and financial policy. According to him, no government will agree to use a criminal policy that can destroy its economy. Further he recalled the questions of international criminal law that still remain open: Should it be possible to hold corporations responsible in international criminal law? Should ecocide be recognized? He emphasised the role played by realism and idealism in this field. Constitutional law is, according to *Vogel*, at the basis of criminal justice. Human rights *sensu strcitu* do not apply to corporations. Conversely, it is very clear, according to *Vogel*, that certain fundamental rights might well apply to corporations. Corporations cannot invoke human dignity, according to him. *Nullum crimen*, *nullum poena*, fair and speedy trial, a sort of presumption of innocence and a partial right against self-incrimination should apply. As *Brodowski* highlighted, there is a core and a non-core area of criminal law. He thinks that CCL is the third track. Lastly, he stressed that substantive law and procedure in the field of CCL are linked, for example with regard to evidentiary standards. Proceedings against corporations could be the topic of a future conference. In relation to the sanctions used against corporations, *Vogel* noticed a trend to use other elements than fines, such as confiscation.

Finally, *Prof. Peter Wilkitzki* (Germany) concluded the symposium; his words—which he himself characterized as some aphoristic footnotes as opposed to a thorough synopsis of the rich variety of contributions—shall be reproduced here in full:

First of all, in my quality as President of the German AIDP Group I would like to congratulate our Young Penalists for this fabulous Symposium which added another highlight to the abundant array of activities they performed during the last years and which again shows that the scientific (and the social) life of our Group would be much poorer without them.

Second remark, now speaking as former Head of the Department of Criminal Law at the Federal Ministry of Justice: I must admit that never in these years I succeeded in fully attaching myself to either those German academics who, following our grand master Jescheck, still stick to the strict principle of "*societas delinquere non potest*", nor to those who hold that a modern criminal law needs to deviate from the old "Germanic" doctrine, and that I always felt quite uneasy in this, as Klaus Tiedemann so nicely put it, "war of religion". I remember how we suffered in the Ministry when we had to position ourselves for another International Colloquium in 1998 devoted to the topic "Criminal Responsibility of Legal and Collective Entities", organized in Berlin by the Max-Planck-Institute for Foreign and International Criminal Law in Freiburg – by the way, under active participation of many young and old AIDP penalists. Not being willing nor able to take a firm stand for one or the other side, we took refuge with one of these Solomonic solutions for which political bodies are (in)famous, namely to send three representatives: one for defending the chemically clean German Dogmatism, one for advocating the New Pragmatism and one (me) for the mission impossible to mediate between these two. Without really showing a personal preference, I then dared the forecast that the new Global Player which had meanwhile appeared on the scene – the European Union – would sooner or later barricade the seemingly comfortable emergency exit used by German lawmakers in order to avoid real changes, namely retreating to the multi-use weapon of German "*Ordnungswidrigkeiten*" which can be inflicted also on legal persons. Today the danger – or the chance – that this avenue will be blocked up is even more imminent than it was fifteen years ago.

Let me finish with a commercial for our "international" AIDP. As one of the AIDP Vice-Presidents I am happy to convey to you the best greetings of the AIDP board, in particular of its President, Professor José-Luis de la Cuesta who would really have liked to join us but unfortunately could not make it. As you know, the AIDP is the oldest Criminal Law Association worldwide, and as early as at its IInd international Congress in Bucharest 1929 it devoted one of its four Sections to the topic "*La responsabilité des personnes morales*" – is it not amazing to see how the Association always has its finger on the pulse of current affairs? So, to conclude, let me raise an imaginary glass on our Good Old Lady AIDP – *vivat*, *crescat*, *floreat*!