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# Potential Jurisdictional Bases for Bringing Corporate-Related Human Rights Abuse Cases before Croatian Courts

Ivana Kunda and Eduard Kunštek\*

## Abstract

*In situations in which human rights abuses are related to corporate activities abroad the issue of international jurisdiction arises whenever the victim contemplates the judicial redress. The problem lays in the means to bring the corporation to justice where human rights abuses were committed in the context of business activity by a company established abroad, usually in a less developed country, and belonging to a transnational corporation originating from a developed country. While, for variety of reasons, the redress in the victim's home country may be ineffective, the access the justice in a developed country might not be as easy as desirable. The authors explore the options for establishing jurisdiction over such cases before Croatian courts focusing primarily on domestic provisions regarding jurisdiction by attraction and adhesive jurisdiction related to criminal proceedings.*

## A. Introduction

In the past century, various reasons have induced domestic corporations to establish their presence in other countries.<sup>1</sup> On a legal level,

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<sup>1</sup> An account of the origins and the then characteristics of the transnational corporations is provided in *McLean*, *The Transnational Corporation in History: Lessons for Today?*, *Indiana Law Journal* 79 (2004), pp. 363-377.

a transnational corporation (TNC)<sup>2</sup> consists of a parent or a controlling company based in a developed country and the subsidiaries or otherwise controlled entities (such as subcontractors in certain circumstances) located in one or more less developed countries. The ever increasing number and size of TNCs prompt debates about different aspects of their complex structures and operations.<sup>3</sup> TNCs' operations have been seen as problematic for avoiding taxes by virtue of transfer prices, meddling in overseas political affairs, or endangering human lives and health frequently resulting from polluting the environment. Such TNC's operations may for legal purposes translate into violation of virtually any of the internationally recognised human rights. Such violations may further on be processed under criminal or civil law, and may take the form of direct wrongdoing such as where the corporation itself commits the actual wrong or indirect wrongdoing where it is involved by aiding and abetting the act committed by the overseas government forces.<sup>4</sup>

It is often very difficult or even impossible to obtain satisfactory redress from the subsidiary directly involved in the violation, for instance where the subsidiary has no assets or where the overseas justice system does not guarantee effective protection.<sup>5</sup> In the

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<sup>2</sup> One of the definitions of TNC is "incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates. A parent enterprise is defined as an enterprise that controls assets of other entities in countries other than its home country, usually by owning a certain equity capital stake." United Nations Conference on Trade and Development, [www.unctad.org/en/Pages/DIAE/Transnational-corporations-%28TNC%29.aspx](http://www.unctad.org/en/Pages/DIAE/Transnational-corporations-%28TNC%29.aspx) (1/12/2015). Despite the use of the term TNC, this paper, however, is not limited in its scope to the companies connected by means of share in the equity capital, but also all other ways in which the control by the domestic company may be exerted over a foreign company.

<sup>3</sup> For an insight into the economic structures and features of TNCs and place of TNCs in the economic-geographic globalisation see *Dicken*, *Global Shift: Mapping the Changing Contours of the World Economy*, 7th ed. 2014, chapter 5.

<sup>4</sup> *Baughen*, *Human Rights and Corporate Wrongs: Closing the Governance Gap*, 2015, p. 4 et seq.

<sup>5</sup> *Augenstein*, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union*, 30/10/2010, [www.en.frankbold.org/sites/default/files/tema/101025\\_ec\\_study\\_final\\_report\\_en\\_0.pdf](http://www.en.frankbold.org/sites/default/files/tema/101025_ec_study_final_report_en_0.pdf) (1/12/2015), p. 61.

absence of adequate protection and/or enforcement options before the overseas courts, such cases have been brought against the parent company before courts in the US, EU, Canada etc. This paper is first intended to provide a brief overview of the judicial responses to the attempts to bring these categories of cases before the courts in the mentioned jurisdictions. The follows an overview of the international, EU and domestic legal sources governing jurisdiction issues, along with explanations of the basic properties of jurisdictional rules in civil matters and listing of pertinent grounds for exercising international jurisdiction. The focus is primarily put on the jurisdiction by attraction and adhesive jurisdiction related to criminal proceedings.

## **B. Summary of Selected Comparative Case Law**

One of the early cases concerned the Bhopal gas tragedy in 1984, in which a toxic gas leaked out of a chemical plant owned and operated by Union Carbide India Limited (UCIL), whose majority owner was the US company Union Carbide Corporation, causing the death of several thousand people and injuring many more. Relying on the doctrine of *forum non convenience*, the US court in *Bhopal* ruled that “the Indian legal system is in a far better position than the American courts to determine the cause of the tragic event and thereby fix liability”.<sup>6</sup>

More recently, the Québec Superior Court of Canada considered the Israeli courts to be in a better position to judge in *Bil'in*.<sup>7</sup> This is the case brought by heirs of a Palestinian landowner and the council of a Palestinian town against two Canadian companies established in Quebec, claiming that by being involved in constructing residential buildings and other settlement infrastructure on *Bil'in* territory, located on the West Bank in the Occupied Palestinian Territories, they were assisting Israel in war crimes, in particular the violation of Article 49(6) of the Fourth Geneva Convention. While the court stated that war crime constitutes civil wrong in Canada and confirmed it has jurisdiction, it dismissed the case on the grounds of *forum non convenience* explaining that “the plaintiffs have selected a forum having little con-

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<sup>6</sup> *In Re Union Carbide Corp Gas Plant Disaster*, 634 F Supp 842 (SDNY 1986).

<sup>7</sup> *Bil'in (Village Council) v Green Park International Ltd and Green Mount International Ltd*, 2009 QCCS 4151.

nection with the Action in order to inappropriately gain a juridical advantage over the Defendants”.<sup>8</sup>

The recent example from the US is the *Kiobel* case. The residents of Nigeria, who claim that Dutch, British, and Nigerian corporations engaged in oil exploration and production aided and abetted the Nigerian government in committing violations of the law of nations, sought damages under the Alien Tort Statute (ATS).<sup>9</sup> Affirming the Second Circuit decision (*Kiobel I*),<sup>10</sup> the US Supreme Court held that a presumption against extraterritorial application of the ATS applied to the facts of *Kiobel*.<sup>11</sup> Around the same time, some other US district courts interpreted the ATS to the contrary,<sup>12</sup> and afterwards confirmed the US court jurisdiction under the *Kiobel II* criteria finding that

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<sup>8</sup> For the criticism of this decision see e.g. *Weill*, *The Role of National Courts in Applying International Humanitarian Law*, 2014, pp. 112-114; *Yap*, *Corporate Civil Liability for War Crimes in Canadian Courts, Lessons from Bil'in (Village Council) v Green Park International Ltd*, *Journal of International Criminal Justice* 8 (2010), pp. 631-648.

<sup>9</sup> The Alien Tort Statute (28 USC. § 1350), also called the Alien Tort Claims Act (ATCA), is a section of the United States Code that reads: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Since 1980s, courts have construed this 1789 Act to allow foreigners to seek remedies before US courts for human rights violations committed outside US territory.

<sup>10</sup> *Kiobel v Royal Dutch Petroleum Co*, 621 F3d 111 (2d Cir 2010).

<sup>11</sup> *Kiobel v Royal Dutch Petroleum Co*, 133 S Ct 1659 (2013). The essential elements of the decision have been summarised by Justice *Breyer*, concurring with the judgment but for other reasons, as follows: “The Court sets forth four key propositions of law: First, the ‘presumption against extraterritoriality applies to claims under’ the Alien Tort Statute. Second, ‘nothing in the statute rebuts that presumption’. Third, there ‘is no clear indication of extraterritorial[ application] here’, where ‘all the relevant conduct took place outside the United States’ and ‘where the claims’ do not ‘touch and concern the territory of the United States [...] with sufficient force to displace the presumption.”

<sup>12</sup> See *Doe v Exxon Mobil Corp*, 654 F3d 11 (DC Cir 2011) vacated on other grounds, 527 Fed Appx 7 (DC. Cir 2013) (establishing that corporations in foreign countries may be liable under ATS for torts committed by their agents); *Flomo v Firestone Nat Rubber Co, LLC*, 643 F3d 1013 (7th Cir 2011) (holding that while ATS allows claims against foreign corporations, the plaintiffs did not prove that violations have happened). See also references in *George*, *The Enterprise of Empire: Evolving Understanding of Corporate Identity and Responsibility*, in: Martin/Bravo (eds.), *The Business and Human Rights Landscape: Moving Forward, Looking Back*, 2016, p. 43, fn. 173.

the plaintiffs' claims on human rights violations "touch and concern" the US "with sufficient force to displace the presumption" against extraterritoriality in applying the ATS, and may be heard by the US court.<sup>13</sup>

In 2013, the District Court of The Hague released its decision in the five cases on Shell's liability for the oil spills in Nigeria.<sup>14</sup> Nigerian farmers, supported by the Dutch environmental NGO *Milieudefensie*, initiated proceedings against the Royal Dutch Shell Plc and its Nigerian subsidiary Shell Petroleum Development Company, claiming liability of both companies for failure to deal with several oil spills in Nigeria. The Court accepted jurisdiction on the basis of the Article 7(1) of the Dutch Code of Civil Procedure.<sup>15</sup>

The same year of 2013, the Paris Court of Appeal ruled that French courts have jurisdiction to hear the case against COMILOG International and COMILOG France brought by more than 850 former local COMILOG workers, claiming unfair dismissal and requesting compensation.<sup>16</sup> The dismissal followed the railway accident in which the COMILOG train transporting manganese from Gabon collided with a passenger train in Congo Brazzaville after which the Gabonese company filed for bankruptcy. The decision on jurisdiction was confirmed by the French Court of Cassation on the grounds of co-employment

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<sup>13</sup> *Doe v Exxon Mobil Corp*, 45 ELR 20136 No 01-1357, (DDC, 7/6/2015) (finding that the alleged violations were committed while the military personnel was providing security services for the Exxon's business in the Aceh Province of Indonesia in 2000 and 2001, noting that the "primary inquiry in deciding whether the presumption against extraterritoriality is displaced is the location of the conduct at issue" and finding that plaintiffs alleged that Exxon's executives located in the US had made decisions regarding the deployment of military personnel as security on the Indonesian premises).

<sup>14</sup> The most important of the judgments is *Rechtbank Den Haag, Friday Alfred Akpan and Vereniging Milieudefensie/Royal Dutch Shell Plc. and Shell Petroleum Development of Nigeria Ltd*, LJN BY9854, 30/1/2013.

<sup>15</sup> The provision of Article 7(1) of the Dutch Code of Civil Procedure reads: "If legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency." Cited according to [www.dutchcivillaw.com/civilprocedureleg.htm](http://www.dutchcivillaw.com/civilprocedureleg.htm) (1/12/2015).

<sup>16</sup> *Cour d'appel de Paris* of 20/6/2013.

by COMILOG France, COMILOG Holding and COMILOG International in conjunction with general heads of jurisdiction because the companies had "*siège social*" in France.<sup>17</sup>

Against the background of the US retreat from exercising jurisdiction to adjudicate the cases of corporate human rights violations,<sup>18</sup> the EU seems to have the opportunity and perhaps even the interest to step in the leading position.<sup>19</sup> While the scope of obligation to extraterritorially protection of human rights is still under discussion in the EU,<sup>20</sup> the possibilities to do so within specific EU Member States are worth exploring. This paper is intended to provide an overview of issues from the Croatian perspective. Admittedly, Croatia might not be listed among developed countries<sup>21</sup> or might be so simply due to its accession to the EU<sup>22</sup> and, unlike some other EU Member States, Croatia does not locate on a large scale its manufacturing business segments in less developed countries. Nevertheless, some features of the Croatian traditional jurisdictional scheme might be helpful in this context.

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<sup>17</sup> Cour de cassation, civile, Chambre sociale de 28/1/2015, n° 13-22994. Curiously, the cited provision is Article 2(1) of the Council Regulation (EC) No 44/2001 of 22/12/2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of 16/1/2001, p. 1. See *infra* E.I.1.

<sup>18</sup> The opinion has been submitted that the US courts applying the ATS were not concerned with law only, but with the US objectives and positions, thus creating double standards for equivalent cases. This has been explained as the result of balancing between two opposing US interests: to present itself as the leader in human rights protection abroad, and to prevent its officials and allies from being responsible for human rights violations abroad. *Weil*, *The Role of the National Courts in Applying International Humanitarian Law*, 2014, p. 114.

<sup>19</sup> *Kirshner*, *A Call for the EU to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses*, *Northwestern Journal of International Human Rights* 13 (2015), pp. 1-26.

<sup>20</sup> See e.g. *Augenstein*, (fn. 5), p. 6 *et seq.*

<sup>21</sup> *World Economic Outlook, Uneven Growth, Short- and Long-Term Factors*, International Monetary Fund, April 15, [www.imf.org/external/pubs/ft/weo/2015/01/pdf/text.pdf](http://www.imf.org/external/pubs/ft/weo/2015/01/pdf/text.pdf) (1/12/2015), p. 51, table 2.2. (Croatia is listed under Emerging and Developing Europe).

<sup>22</sup> *UN World Economic Situation and Prospects 2015, Country Classification, 2015*, [www.un.org/en/development/desa/policy/wesp/wesp\\_archive/2015wesp\\_full\\_en.pdf](http://www.un.org/en/development/desa/policy/wesp/wesp_archive/2015wesp_full_en.pdf) (1/12/2015), p. 139, table A (Croatia is listed among the developed economies).

### **C. Legal Sources**

Croatia is not a party to any multilateral international convention, which contains rules on international jurisdiction relevant to this report.<sup>23</sup> The only pertinent multilateral conventions are those which regulate arbitration issues;<sup>24</sup> however, the focus of this paper is not on arbitration, but on court jurisdiction. There are a few bilateral conventions containing provisions on international jurisdiction.<sup>25</sup>

When Croatia joined the EU on 1 July 2013, regulations concerned with international jurisdiction became directly applicable. At first, the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation)<sup>26</sup> applied, subsequently replaced by the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and

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<sup>23</sup> Croatia is a party to multilateral conventions regulating international jurisdiction in tort cases involving, e.g. vessel collisions, nuclear damage, oil pollution and transport.

<sup>24</sup> The most important of these conventions are: the New York Convention on Recognition and Enforcement of Arbitration Decisions of 1958, Official Journal of the SFRY – International Treaties 11/1981 and Official Gazette of the Republic of Croatia – International Treaties 4/1994; the European Convention on International Commercial Arbitration of 1961, Official Journal of the SFRY – International Treaties 12/1963 and Official Gazette of the Republic of Croatia – International Treaties 4/1994; the Washington Convention on Settling the Investment Disputes between the States and Nationals of Other States of 1965, Official Gazette of the Republic of Croatia – International Treaties 2/1998; and the Protocol on Arbitration Clauses of 1923, Official Journal of the FPRY – International Treaties 4/1959 and Official Gazette of the Republic of Croatia – International Treaties 4/1994 and the Convention on Execution of Foreign Arbitral Awards of 1927, Official Journal of the FPRY – International Treaties 4/1959 and Official Gazette of the Republic of Croatia – International Treaties 4/1994.

<sup>25</sup> Some of these conventions ceased to apply when Croatia joined the EU. A case in point is the 1960 Convention on Legal Assistance in Civil and Criminal Matters with Poland, Official Journal of the SFRY – Addendum 5/1963, which was in force from 5/6/1963 to 1/7/2013. Its Article 43 provided for jurisdiction in tort cases, by listing several alternative criteria: the place where the tortious act was committed, the place of the defendant's residence, and the place where the defendant's property is located.

<sup>26</sup> OJ L 12 of 16/1/2001, p. 1.



the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis Regulation).<sup>27</sup>

The basic domestic legal source is the Resolution of Conflict of Law with the Laws of Other Countries in Certain Relations Act (PIL Act).<sup>28</sup> This Act dates back to the early 1980s and was only slightly modified when incorporated into Croatian law in 1991.<sup>29</sup> This codification of both the conflicts and procedural rules relevant to matters having international elements applies whenever international treaties in force in Croatia, the EU regulations or special domestic laws do not contain a specific rule. Another act particularly relevant to the topic of this paper is the Civil Procedure Act (CivPA).<sup>30</sup>

Inevitable under this topic are the UN Guiding Principles on Business and Human Rights proposed by UN Special Representative on business and human rights John Ruggie, and endorsed by the UN Human Rights Council in Resolution 17/4 of 16 June 2011.<sup>31</sup> These

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<sup>27</sup> OJ L 351 of 20/12/2012, p. 1.

<sup>28</sup> Official Journal of the SFRY 43/1982 and 72/1982; Official Gazette of the Republic of Croatia 53/1991.

<sup>29</sup> Although there had been an initiative to draft new legislation, it had been losing momentum, probably due to the anticipated Croatian membership in the European Union, after which the EU legal instruments on private international law will become applicable on these basis. Nevertheless, discussion yielded a proposal on the conflicts rules and partial response, as well as some sporadic opinions. See *Sajko/Sikirić/Bouček/Babić/Tepoš*, *Izvori hrvatskog i europskog međunarodnog privatnog prava* (Sources of Croatian and European Private International Law), 2001, pp. 259-340; *Šarčević/Tomljenović*, *Primjedbe na teze za zakon o međunarodnom privatnom pravu*, autora prof dr Krešimira Sajka, prof dr Hrvoja Sikirića i doc dr Vilima Boučeka (Remarks to the Thesis for the Private International Law Act Proposed by Prof. Dr. Krešimir Sajko, Prof. Dr. Hrvoje Sikirić and Assistant Prof. Dr. Vilim Bouček), *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* (Collected Papers of the Law Faculty of the University of Rijeka) 22 (2001), pp. 655-75.

<sup>30</sup> Official Journal of the SFRY 47/1977, 36/1977, 36/1980, 69/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990 and 35/1991; Official Gazette of the Republic of Croatia 53/1991, 91/1992, 58/1993, 112/1999, 88/2001 and 117/2003.

<sup>31</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, adopted by the United Nations Human Rights Council Resolution 17/4, Human rights and transnational corporations and other business enterprises, UN Doc A/HRC/17/L.17/Rev.1 of 16/6/2011, [www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV.pdf](http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf) (1/12/2015).

Principles are addressed to states, companies and other stakeholders who may improve protection of individuals and communities from adverse corporate violations of human rights. They are based on the three-pillar protect-respect-remedy framework: the state's duty to protect, the corporation's duty to respect and the effective access to judicial and non-judicial remedies.<sup>32</sup> Their soft law character, however, prevents them from being more than a moral authority when it comes to judicial assessments of such business activities.

#### **D. Rigidity of Jurisdiction Rules**

The provision of Article 27 of the CivPA provides that the Croatian courts are competent to hear international cases if provided by a statute or an international convention, meaning that the Croatian legal system does not allow judicial discretion similar to the common law doctrines of *forum non conveniens* or *forum conveniens*. Consequently, a Croatian court may establish its jurisdiction in an international case only where there is a provision conferring such jurisdiction upon the Croatian courts and the circumstances of the case fall within it. It may decline its jurisdiction only where such a provision does not exist or where the application of the provision to the circumstances of the case does not result in the international jurisdiction of the Croatian courts.<sup>33</sup>

The situation is similar under the Brussels I bis Regulation. In *Owusu v Jackson*,<sup>34</sup> the CJEU ruled that the Brussels regime precludes a Member State court from declining the jurisdiction conferred on it on the ground that a court of a non-Member State would be a more appropriate forum for the trial. Thus, the provisions of the Brus-

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<sup>32</sup> *Sanders*, The Impact of the 'Ruggie Framework' and the 'United Nations Guiding Principles on Business and Human Rights' on Transnational Human Rights Litigation, in: Martin/Bravo (eds.), *The Business and Human Rights Landscape: Moving Forward, Looking Back*, 2016, p. 293.

<sup>33</sup> See *Dika*, in: *Dika/Knežević/Stojanović, Komentar Zakona o međunarodnom privatnom i procesnom pravu* (Commentary on the Statute on Private International and Procedural Law), 1991, p. 176.

<sup>34</sup> CJEU, case C-281/02, *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and others*, ECLI:EU:C:2005:120.

sels I bis Regulation may not be affected by national jurisdictional doctrines such as *forum non conveniens*.<sup>35</sup>

In both EU and Croatian domestic legal systems, the court's task of establishing or declining jurisdiction is not contingent on the parties' submissions, because the court must *ex officio* verify its international jurisdiction to adjudicate *in casu*.<sup>36</sup>

## E. General and Special Jurisdiction Grounds

The rules of the Brussels I bis Regulation and the PIL Act that are pertinent to establishing the international jurisdiction of the Croatian courts and other bodies in cases related to human rights abuses in the context of corporate activities are divided into rules on general and special jurisdiction.

### I. General Jurisdiction

#### 1. EU Law

Under Article 4(1) of the Brussels I bis Regulation, persons domiciled in a Member State may be sued before the courts of that Member State. The natural person's domicile is to be determined under the law of the Member State in which the alleged domicile is located. The legal person's domicile is wherever any of the three is located: statutory seat, central administration and principal place of business.<sup>37</sup>

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<sup>35</sup> There is a window for application of the *forum non conveniens* doctrine in the Brussels I bis Regulation contrary to the reversal of the decision in *Owusu v Jackson*, as suggested by some commentators. The window is limited to situations in which there is a *lis pendens* in a non-member state under specified conditions (Articles 33 and 34).

<sup>36</sup> See Article 28(1) of the Brussels I bis Regulation and Article 15 of the CivPA.

<sup>37</sup> Articles 62 and 63 of the Brussels I bis Regulation.

## **2. Croatian National Law**

Under Article 46 of the PIL Act,<sup>38</sup> the Croatian courts shall have international jurisdiction if the defendant is domiciled (for natural persons) or has its seat (for legal persons) in Croatia.<sup>39</sup> It is questionable whether this provision would apply at all in relevant situations, because the Brussels I bis Regulation permits resort to national rules on international jurisdiction only in situations in which the defendant does not have its domicile in any EU Member State.

## **II. Special Jurisdiction**

Special heads of jurisdiction concern specific legal relations, including contracts and torts, and although none of them specifically refers to human rights violations, they may apply in these cases as well.

### **1. EU Law**

Under the Brussels I bis Regulation, applicable as against the defendants domiciled in any EU Member State in matters relating to a contract, courts for the place of performance of the obligation in question have jurisdiction, while two situations differ. The first situation applies in the cases involving the sale of goods and the provision of services, and is based on the characteristic performance criterion: jurisdiction is established in the place of delivery of the goods or provisions of the services. The second situation encompasses all other contracts and the in the courts for the place of performance of the obligation in question are competent to hear the case.<sup>40</sup> Additionally, in matters relating to tort, delict or quasi-delict, the lawsuit may be brought before the courts for the place where the harmful event

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<sup>38</sup> Two other provisions of Article 46 of the PIL Act on subsidiary general jurisdiction are of lesser relevance as they contain heads of jurisdiction limited to natural persons: The Croatian courts shall have jurisdiction if the defendant is domiciled neither in Croatia nor in another country, but has residence in Croatia. If the litigants are Croatian nationals and the defendant has residence in Croatia, the Croatian courts shall have international jurisdiction to hear any type of case.

<sup>39</sup> This is to be understood as the company's registered seat. See *Dika*, (fn. 33), p. 169.

<sup>40</sup> Article 7(1) of the Brussels I bis Regulation.

occurred or may occur. These provisions have been interpreted on many occasions but further discussion is beyond the scope of this paper.

## 2. Croatian National Law

Provided that the defendant is not domiciled in any EU Member State, Croatian courts would apply the PIL Act. Special rule of jurisdiction for torts in PIL Act provides that the Croatian courts shall have jurisdiction if the damage has occurred on the territory of the Republic of Croatia.<sup>41</sup> Croatian scholarship is divided on the meaning of this provision. Some commentators tend to believe that the phrase “damage occurring in the Republic of Croatia” should be construed in a limited sense to encompass only those situations in which the place of the damage, i.e. the consequences of tortious act (*locus damni*), is in Croatia.<sup>42</sup> Other scholars hold that, irrespective of this phrase, a broader interpretation would be consistent with the doctrine of ubiquity, according to which the damage occurs both in the place where the tortfeasor acts (*locus actus*) and in the place where the consequence of such wrongful action is felt (*locus damni*).<sup>43</sup> However, this interpretation would exclude the possibility of bringing a lawsuit in Croatia if only an indirect damage occurs there, as has been confirmed several times over the past 15 years by the Supreme Court of

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<sup>41</sup> Article 53(1) of the PIL Act.

<sup>42</sup> *Dika*, (fn. 33), p. 197.

<sup>43</sup> *Sajko*, Perspektiva razvoja međunarodnog privatnog prava: O Briselskoj i Luganskoj konvenciji o nadležnosti i izvršenju odluka u građanskim i trgovačkim predmetima i kako Hrvatsko pravo uskladiti s tim konvencijama (Development Prospect of Private International Law: On the Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and How to Harmonise Croatian law with these Conventions), in: Gavella et al., Hrvatsko građanskopravno uređenje i kontinentalnoeuropski pravni krug (Croatian Civil Regulation and Euro-continental Legal Circle), 2nd ed. 1994, p. 239; *Tomljenović*, Posebna međunarodna nadležnost u sporovima izvanugovorne odgovornosti za štetu – neka otvorena pitanja tumačenja i kvalifikacije (Special International Jurisdiction in Non-Contractual Disputes – Some Open Questions of Interpretation and Qualification), Zbornik Pravnog fakulteta Sveučilišta u Rijeci (Collected Papers of the Law Faculty of the University of Rijeka) 19 (1998), p. 907 et seq.

the Republic of Croatia.<sup>44</sup> Additionally, the international jurisdiction in tort may be based on the tacit prorogation where a defendant enters a plea in merits without challenging the jurisdiction.<sup>45</sup>

In contracts, the international jurisdiction of Croatian courts may be based on the abovementioned general headings as well as on several special headings of jurisdiction provided in the PIL Act. Regarding a claim involving an economic interest<sup>46</sup> (Croatian *imovinskopravni zahtjev*, corresponding to the German notion of *vermögensrechtlicher Anspruch*), the Croatian courts shall have jurisdiction if the defendant's property or the object claimed in the lawsuit is located in Croatia.<sup>47</sup> Likewise, the Croatian courts shall have international jurisdiction with respect to obligations that were created during the defendant's stay in Croatia.<sup>48</sup> In the proceedings against a natural or legal person seated abroad, and concerning the obligations created in the territory of Croatia or to be performed in the territory of Croatia, the Croatian courts shall have international jurisdiction provided that this person's representative or agent is located in Croatia or that a company which has been entrusted to carry out the business on its behalf is located in Croatia.<sup>49</sup> The mentioned criteria must be fulfilled cumulatively, meaning that the fact that the defendant's agent is in Croatia is insufficient;

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<sup>44</sup> In the Supreme Court of the Republic of Croatia decision Rev 2390/94 of 3/9/1997, published in *Sudska praksa* (Court Practice) 4 (1998), p. 91, it was clearly stated that the term "occurrence of damage" means the bodily injury, death or damage to a thing. This was transformed into legal opinion accepted at the meeting of the Supreme Court Civil Law Section (III/07) Su-IVg-46/2007-3 held on 26/2/2007. See also the Supreme Court of the Republic of Croatia decisions Rev-758/1995-2 of 6/5/1998, [www.sudskapraksa.vsrh.hr](http://www.sudskapraksa.vsrh.hr) and Revt-51/03-2 of 27/2/2007, [www.sudskapraksa.vsrh.hr](http://www.sudskapraksa.vsrh.hr) (1/12/2015).

<sup>45</sup> Article 50 of the PIL Act.

<sup>46</sup> This does not include the rights *in rem* in an immovable or tenancy rights. Pursuant to Article 56 of the PIL Act, the actions concerning such rights are subject to the exclusive jurisdiction of Croatian courts if the immovable is located in the territory of Croatia.

<sup>47</sup> Article 54(1) of the PIL Act.

<sup>48</sup> Article 54(2) of the PIL Act.

<sup>49</sup> Article 55 of the PIL Act. For more details on the interpretation of the provision see *Babić*, *Međunarodna nadležnost za ugovorne sporove u europskom, hrvatskom i američkom pravu* (International Jurisdiction for Contractual Disputes in European, Croatian and American Law), 2005, pp. 241-250.

the obligation either has to be created or has to be fulfilled in Croatia.<sup>50</sup> Additionally, the parties may explicitly agree to confer the jurisdiction in contract to the Croatian court, provided that at least one of them is a Croatian national or a legal person having its seat in Croatia.<sup>51</sup> The jurisdiction in contract may also be based on the tacit prorogation where a defendant enters a plea on the merits without challenging the jurisdiction.<sup>52</sup>

Some commentators hold that the *forum solutionis* rule determining the domestic territorial jurisdiction in the CivPA<sup>53</sup> can be used as the special heading of international jurisdiction for both torts and contracts.<sup>54</sup> This seem to be an incorrect approach, since the provisions on domestic territorial jurisdiction may be “converted” into the provisions on international jurisdiction only under the condition that there is no special provision on international jurisdiction for these types of legal relations in Croatian law.<sup>55</sup> Given that there are such special provisions, cited above, there is no room for expanding the international jurisdiction of Croatian courts in these matters.<sup>56</sup>

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<sup>50</sup> The Supreme Court of the Republic of Croatia, Rev-79/91 of 21/1/1992, cited in *Sajko et al.* (fn. 29), p. 160 et seq.

<sup>51</sup> Article 49(2) of the PIL Act.

<sup>52</sup> Article 50 of the PIL Act.

<sup>53</sup> Article 58(3) of the CivPA.

<sup>54</sup> *Babić*, (fn. 49), p. 220 et seq.; *Babić*, *Međunarodna nadležnost prema mjestu ispunjenja ugovorne obveze u europskom i hrvatskom pravu* (International Jurisdiction Based on the place of Performance of Contractual Obligation in European and Croatian Law), in: Tomljenović/Čulinović Herc/Butorac (eds.), *Hrvatska na putu prema europskom pravosudnom području: Rješavanje trgovačkih i potrošačkih sporova* (Croatia on the Way to the European Judicial Area: Resolving Commercial and Consumer Disputes), 2009, p. 112 et seq. See also the decisions of the High Commercial Court, Pž-2826/93 of 1/2/1994, Pž-2698/96 of 14/1/1997, Pž-2622/99 of 6/7/1999 (in contracts) and Pž-2468/96 of 25/11/1997 and Pž-3092/97 of 9/12/1997 (in torts).

<sup>55</sup> Article 27 of the CivPA.

<sup>56</sup> *Grbin*, *Nadležnost sudova u građanskim stvarima s međunarodnim elementom* (Jurisdiction of the Courts in Civil Matters with and International Element), *Pravo u gospodarstvu* (Law in Economy) 35 (1996), p. 234; *Tomljenović*, *Pravila o mjesnoj nadležnosti u funkciji pravila o međunarodnoj nadležnosti: kada i kako?* (The Rules on Territorial Jurisdiction as Rules on International Jurisdiction: When and How?), *Vladavina prava* (The Rule of Law) 2 (1998), p. 104.

## **F. Jurisdiction by Attraction**

The abovementioned heads of jurisdiction have proved to be of limited use in the context of the cases this paper deals with. However, jurisdiction by attraction appears to have a stronger potential.

Prior to discussing the details regarding the jurisdiction by attraction, a brief note on its categorization seems appropriate. In the Brussels I system, this type of jurisdiction is classified under the heading of Special Jurisdiction, while in the Croatian domestic system, it is classified under the article on general provisions.<sup>57</sup> The discrepancy is simply in nomenclature and not in substance, owed merely to different outlooks. In the Croatian doctrine on private international law, the notion of general jurisdiction means that the jurisdiction thus prescribed is not limited to specific types of legal relations but extends to all legal relations, while the special jurisdiction means that it is designed specifically for a particular type of legal relationship (such as contacts, torts, marriage, adoption, succession etc.).<sup>58</sup> It seems that the notion of general (jurisdiction) within the Brussels regime connotes the basic jurisdiction while other provisions relate to special cases regardless of their subject-matter scope, although mostly reflecting the division between types of legal relationships.<sup>59</sup> Irrespective of this difference in perspectives, jurisdiction by attraction is a similar concept in both legal instruments and is important for tackling the problems of international jurisdiction in cases of human right abuses by companies established abroad and belonging to a TNC.

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<sup>57</sup> This category also includes a provision on jurisdiction in the proceedings against a Croatian national who lives abroad where he or she has been sent on duty or to work by a state body, a company or another legal person. In such a case, the Croatian courts shall have jurisdiction, provided that the Croatian national in question was domiciled in Croatia (Article 46(1)-(4) of the PIL Act) and the rule on the so-called retorsion head of jurisdiction, e.g. where the law of a foreign State provides a criterion for establishing the jurisdiction of its courts in the proceedings against a Croatian national, the same criterion, although not provided in Croatian law, may be used for establishing the jurisdiction of the Croatian courts in the proceedings against the national of that foreign State (Article 48 of the PIL Act).

<sup>58</sup> *Vuković/Kunštek*, *Međunarodno građansko postupovno pravo* (International Civil Procedure Law), 2005, pp. 35-36 and 57.

<sup>59</sup> See also Article 7(5) of the Brussels I Regulation which is not defined by the type of legal relation, which may perhaps be regarded as a subsidiary general jurisdiction.



## I. EU Law

Article 8(1) of the Brussels I bis Regulation states that a person domiciled in one Member State may be sued in another, as one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The provision, aimed typically to pursue connected claims against co-debtors or joint tortfeasors, has been subject to interpretation by the CJEU, and its requirements (in particular, the close connection and irreconcilability of judgments) have been thoroughly discussed in the commentaries and other scholarship.

## II. Croatian National Law

With a similar aim, the jurisdictional rule on joinder of parties in the PIL Act provides that if two or more defendants are sued in the capacity of co-litigants under substantive law (Croatian *materijalni suparničari*, which corresponds to the German notion of *materielle Streitgenossenschaft*), the Croatian courts shall have supplemental jurisdiction to adjudicate the case against all defendants, provided one of those defendants has its domicile or seat in Croatia.<sup>60</sup> This provision resembles a provision applicable in the national context with respect to jurisdiction *ratione loci* in Article 50 of the CivPA.<sup>61</sup>

### 1. The Concept of “Materijalni Suparničari”

Article 196(1)(1) of the CivPA states that a relevant connection between defendants exists if, they are in a legal community regarding

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<sup>60</sup> Article 46(1)-(4) of the PIL Act. Where a provision of the PIL Act designates jurisdiction to Croatian courts or other bodies based on Croatian nationality, for stateless person such jurisdiction shall exist provided that he or she is domiciled in Croatia (Article 51 of the PIL Act).

<sup>61</sup> Official Journal of the SFRY 4/1977, 36/1977, 36/1980, 6/1980, 69/1982, 43/1982, 58/1984, 74/1987, 57/1989, 20/1990, 27/1990, 35/1991; Official Gazette of the Republic of Croatia 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 25/2013 and 89/2014.

the subject matter of the dispute (such as where they are both heirs of the deceased person, or they are co-owners of the property, provided their community is connected to the matter of the dispute) or if their rights or obligations derive from the same factual and legal basis – *idem factum, idem ius* (such as where the same contract or the same tortious act constitute the basis for the claims which are subject to the same law).<sup>62</sup> In the latter case, which might be particularly relevant for the topic of this paper, the same legal and factual ground of the lawsuit must already exist between the co-defendants at the time the lawsuit is brought before the court.

There are specific cases in which the law qualifies certain persons as *materijalni suparničari*,<sup>63</sup> but those are outside the topic of this paper. According to legal commentaries, the legal community, as a precondition to characterise persons as *materijalni suparničari*, exists where the persons are jointly and severally liable.<sup>64</sup> Furthermore, if the claims against the defendants are not based on the same legal ground, the conditions for joinder of *materijalni suparničari* as co-defendants are not met.<sup>65</sup> However, the notion of *idem factum, idem ius* has been broadly interpreted to cover not only the situation in which the facts and the legal provisions are identical, but also where the factual background is the same and the claims are based on the same type of liability.<sup>66</sup> The co-defendants are considered *materijalni*

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<sup>62</sup> Joinder of defendants in Croatia has been regulated since at least the mid-19th century under the Temporary Civil Procedure. See *Ivošević, Suparničarstvo (Co-Litigation)*, 1979, pp. 32 and 34.

<sup>63</sup> *Dika, Građansko parnično pravo: Stranke njihovi zastupnici i treći u parničnom postupku (Law on Civil Litigation: Parties, their Representatives and Third Parties in Litigation)*, 2008, p. 134.

<sup>64</sup> *Ibid.*, pp. 137-138 and 139.

<sup>65</sup> High Commercial Court of the Republic of Croatia, PŽ-2123/94 of 13/7/1994 – this and all further judgments accessible at [www.iusinfo.hr](http://www.iusinfo.hr) (1/12/2015). There was an international element to this case (the plaintiff was foreign natural person); however, the court mistakenly referred only to the CivPA, and not to the PIL Act. Nevertheless, this does not affect the finding on the concept of *materijalni suparničari*.

<sup>66</sup> *Dika*, (fn. 63), p. 137. The author further explains that the fact that different persons participating in the same harmful event might have different injuries and that they might claim different categories of material or immaterial damage do not affect the status of *materijalni suparničari*. However, this conclusion focuses on victims, while

*suparničari* provided that the claims assert their liability for the same harmful event.<sup>67</sup> This interpretation seems to embrace the situations in which the parent (or controlling) company and the daughter (or controlled) company acted together causing the same violation of human rights. Unfortunately, as it is often difficult to prove, it is necessary to search for another legal basis.

Despite the fact that the concept of *materijalni suparničari* has been interpreted in the case law mostly related to jurisdiction *ratione loci* in the CivPA, it is pertinent in relation to establishing international jurisdiction under the PIL Act. However, in cross-border situations one has to be mindful of the applicable law and of the delineation between procedural and substantive issues. While the joinder of defendants who are *materijalni suparničari* is a provision of procedural law and the forum procedural law sets the criteria that have to be fulfilled, assessment of the facts and law in order to establish whether the criteria are met is predominantly a question of substantive law. The type of liability as well as other issues related to liability and non-contractual relationship as a whole are to be resolved by the applicable law based on the conflict of law rules of the forum.<sup>68</sup> Croatian court dealing with cross-border cases concerned with civil liability for violation of human rights would be in the position to apply the provisions of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).<sup>69</sup> If, however, the event taking place had not happened and the proceedings have not been commenced

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this paper is dealing with characterising wrongdoers as *materijalni suparničari* for the purpose of establishing international jurisdiction over them.

<sup>67</sup> County Court in Varaždin, Gž.359/05-2 of 1/3/2005. Likewise, there is a legal community between the main debtor and the guarantor who are jointly and severally liable for the performance of the obligations towards the creditor which makes them *materijalni suparničari*. High Commercial Court of the Republic of Croatia, Pž-4248/09 of 18/9/2009; see also High Commercial Court of the Republic of Croatia, Pž-7645/04 of 20/2/2007.

<sup>68</sup> See also *Dika*, (fn. 33), p. 170.

<sup>69</sup> OJ L 199 of 31/7/2007, p. 40. See in particular Article 15 which operates in relation to the conflict of law provisions.

on 1 July 2103 or later,<sup>70</sup> the Croatian national provisions in the PIL Act would apply.<sup>71</sup>

## **2. The Special Case of Piercing the Corporate Veil**

Company law offers certain solutions for those attempting to join by attraction a foreign company and its domestic parent or controlling company. Under the provision of Article 1(2)(f) of the Rome I Regulation, the issues related to company law, including the personal liability of its officers and members, are excluded from the scope of the Regulation and left to the applicable national law. The Croatian Companies Act (CompA)<sup>72</sup> regulates several situations in which, in addition to the company itself, another person may be liable for damage. This is an institute well-known in comparative law as “piercing the corporate veil”.<sup>73</sup> Under specific circumstances, Croatian law permits the court to disregard the company’s imitated liability and hold its shareholders or directors personally liable for the company’s actions or debts. In such situations, a company and its shareholder or its director may be considered *materijalni suparničari*.

In the situation in which the company director is liable for the debts which the company has towards its creditors because the director

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<sup>70</sup> Croatia became an EU Member State on 1/7/2013, and the Rome II Regulation is in force in Croatia as of that date. Following the reasoning of CJEU, case C-412/10, *Deo Antoine Homawoo v GMF Assurances SA*, ECLI:EU:C:2011:747, it may be concluded that the Rome II Regulation does not apply in Croatia to events that have occurred before its entering into force in Croatia.

<sup>71</sup> See Article 53 of the PIL Act.

<sup>72</sup> Official Gazette of the Republic of Croatia 111/1993, 34/1999, 121/1999, 52/2000, 118/2003, 107/2007, 146/2008, 137/2009, 111/2012, 125/2011, 68/2013 and 110/2015.

<sup>73</sup> It is submitted that in many cases courts faced with a transnational corporate liability case focus on the parent company’s duty of care in order to avoid the complex issues related to piercing the corporate veil; consequently the parent company is held liable for its own violations rather than for the violations of its subsidiaries as different legal entities. *Wouters/Ryngaert*, *Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction*, *The George Washington International Law Review* 4 (2009), pp. 939, 947.

failed to exercise the due care in managing the company,<sup>74</sup> the plaintiff has the option to join the company and the director as the co-defendants before the same court.<sup>75</sup> More importantly, pursuant to Article 10(3) of the CompA, a shareholder in a company who misuses the rule limiting its liability, shall be liable for the company's obligations in question. This general provision is supplemented in Article 10(4) by an exemplary list of circumstances in which the abuse is presumed (and need not be proven): 1. if a shareholder uses the company to achieve the goal which is otherwise prohibited, 2. if a shareholder uses the company to damage the creditors, 3. if a shareholder, contrary to the law, manages the company assets as if they were his own, 4. if a shareholder, for its own benefit or for the benefit of another person, reduces the company assets, despite the fact that it knew or had to know that the company will not be able to meet its obligations. The provision on piercing the corporate veil in the CompA is a concretization of the principle of prohibiting abuse of rights.<sup>76</sup>

Thus, the court shall pierce the corporate veil where the first defendant as the controlling company uses the operations of the second defendant as the controlled company owned by the first defendant for a purpose which a joint stock company would otherwise not be able to achieve. The facts indicate the following activities: a) mixing the assets of the controlling company and the controlled company in the course of business of the controlled company (in bankruptcy), b) managing the business operations in both companies by the same person, in the same premises, using the same work tools, c) both companies' bank accounts were blocked, and d) not keeping the company's accountancy books orderly. In such a situation, the first defendant-controlling company as a shareholder of the second defendant has to submit to the second defendant's creditors request for its assets with the purpose of collecting debts owed by

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<sup>74</sup> This liability exists under the CompA: for joint stock companies under Articles 252, 272 and 272k, and for the limited liability companies under Articles 430 and 439.

<sup>75</sup> High Commercial Court of the Republic of Croatia, Pž-2775/03 of 10/12/2002. This was decided based on the former Courts Act, Official Gazette of the Republic of Croatia 3/94, 100/96, 115/97, 137/97, 129/00, 67/01 and 5/02, which in Article 19 contained the definition of *materijalni suparničari* (also contained in Article 196(1)(1) of the CivPA).

<sup>76</sup> *Barbić*, Pravo društava: Opći dio (Company Law: General Part), 2005, p. 300.

the second defendant-controlled company. In the court's opinion this was a clear case of mixing the company's assets with the assets of the company's shareholder resulting in the impossibility to tell whether individual and/or all items forming the assets belong to the company's assets or the assets of the company's shareholder.<sup>77</sup>

The four listed descriptions are only the most common ones, while the case law has confirmed that there might be other circumstances in which piercing of corporate veil is possible, such as in relation to liability towards the employees where the former employee of the trade (*obrt*) was not given the employment contract with the newly-founded company (although working for it) and the tradesman (*obrtnik*) was the only shareholder and the only director in the new company,<sup>78</sup> or where the employees of the first defendant company are engaged in one of the sixteen subsidiaries forming a holding founded by the first defendant company, each with only a small share capital, while at the same time the parent company as the only shareholder in the subsidiaries, withheld significant assets.<sup>79</sup> The court pierced the corporate veil because of the mixing of assets where a tradesman owning and managing a company was using the same company name and trade name, the same address and the same business memoranda in the context of the same type of business operations.<sup>80</sup>

The fact that the subsidiary was concluding the simulated contracts does not itself amount to a misuse of the circumstance that shareholders' liability is limited to their shares in the company. The court further explained that the *onus probandi* is on the plaintiff claiming the piercing of corporate veil.<sup>81</sup> Conversely, the court found that requirements for piercing the corporate veil were met where the

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<sup>77</sup> Supreme Court of the Republic of Croatia, Pž-6369/03 of 17/2/2004.

<sup>78</sup> Supreme Court of the Republic of Croatia, Rev-58/00 of 14/2/2001.

<sup>79</sup> High Commercial Court of the Republic of Croatia, Pž-9140/03 of 17/1/2006, Informator (Informer) 5572-5573 of 1/8/2007.

<sup>80</sup> *Barbić*, (fn. 76), p. 302, and the case cited therein: High Commercial Court of the Republic of Croatia, Pž-1008/98 of 7/4/1998, ING Pregled sudske prakse (ING Court Practice Overview) 4 (1998), p. 27 (No. 221.32).

<sup>81</sup> Supreme Court of the Republic of Croatia, Revt 60/04-2 of 6/10/2004, Izbor VSRH 2/2004.

company established another company and concluded simulated transactions with the sole aim of transferring assets from one company to the other (such as intermediary contracts entailing high intermediary fees). In fact, one company was doing business through another company by selling goods or providing services, while the former company was collecting payments.<sup>82</sup>

Most frequently, the Croatian courts find that the conditions for piercing the corporate veil exist in cases where a company is owned by a single person, who is at the same time the company's manager and legal representative. However, the general provision presents ample possibilities to prove abuse and provide the court with basis to pierce the corporate veil in other situations. In order to rely on this legal institute, the party suffering damage has to sue both the company and its shareholders. If their liability is joint and several, deriving from the same factual circumstances and is based on the same legal ground, they are considered *materijalni suparničari*. This would be sufficient to sue them both before the Croatian court if this is where one of them has its domicile or seat.

### **3. Characteristics of the Proceedings Joining “Materijalni Suparničari”**

The fact that co-defendants, being the main debtors and guarantors, are jointly and severally liable, does not put them in the position of the same party because the decisions on the merits need not be identical towards all of them, either under the law or owing to the nature of their relationship. Therefore, where a decision is rendered in relation to one of the guarantors who is jointly and severally liable, others may be subject to a separate decision because the obligation terminates where the creditor has received the claimed amount.<sup>83</sup> For the same reason, the fact that the plaintiff has obtained a final decision against the first defendant does not constitute an obstacle for the court to issue an order against the second defendant to jointly

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<sup>82</sup> *Barbić*, (fn. 76), p. 302, and the case cited therein: Supreme Court of the Republic of Croatia, Revt-60/04 of 27/10/2004, *Pravo i porezi* (Law and Taxes) 8 (2006), p. 72.

<sup>83</sup> County Court in Varaždin, Gž.1831/05-2 of 22/11/2005.

and severally fulfil the respective obligation.<sup>84</sup> Where one of the co-defendants who is jointly and severally liable with others and who may be subject to different decisions on the merits (e.g. where they are *materijalni suparničari*), objects to the court's jurisdiction *ratione loci*, the court may decline jurisdiction in relation to this defendant only, again because they are all treated as separate parties and their activities or omissions in the course of a trial do not benefit or harm any other co-defendant.<sup>85</sup> For the same reason, where co-defendants are subject to possibly different decisions on the merits and where there are reasons to stay the proceedings in relation to one of them (such as where the company has been erased from the company register and cease to exist), the court may stay the proceedings in relation to that defendant only, but not in relation to others.<sup>86</sup> Unlike purely domestic situations where the CivPA applies, in cross-border cases under the PIL Act, it is irrelevant whether the defendant who is domiciled or seated in Croatia is the main or accessory debtor.<sup>87</sup> The order in which co-defendants who are *materijalni suparničari* are listed in the statement of claim has no bearing over establishing the court jurisdiction.<sup>88</sup>

## **G. Adhesive Jurisdiction in connection with Criminal Proceedings**

In many countries, civil claims related to violation of human rights might be brought before the courts not only within separate civil proceedings, but also in connection with the criminal proceedings.

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<sup>84</sup> High Commercial Court of the Republic of Croatia, Pž-2184/91 of 26/10/1993. Under the Croatian substantive law, once one of the debtors fulfils the entire obligation towards the creditor, the creditor can no longer request other debtors to fulfil the same obligation.

<sup>85</sup> Supreme Court of the Republic of Croatia, Gr1 250/08-2 of 15/7/2008.

<sup>86</sup> High Commercial Court of the Republic of Croatia, Pž-1502/08 of 16/3/2009.

<sup>87</sup> *Dika*, (fn. 63), p. 138.

<sup>88</sup> High Commercial Court of the Republic of Croatia, Pž-5505/09 of 30/9/2009.



## I. EU Law

The Brussels I bis Regulation in Article 7(3) provides that a person may be sued as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the Member State court seized of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings. This provision limits the type of proceedings to those in which damages or restitution is claimed and makes the jurisdiction conditional upon the national procedural rules of the forum.

## II. Croatian National Law

In Croatia, civil claims may be applied for in the course of the criminal proceedings. The provision of Article 153 of the Criminal Procedure Act (CrimPA)<sup>89</sup> states that, at the request of the entitled persons,<sup>90</sup> a claim involving an economic interest (Croatian *imovinskopravni zahtjev*, corresponding to the German notion of *vermögensrechtlicher Anspruch*) resulting from the criminal offence shall be adjudicated in the criminal proceedings, unless this would cause considerable delay in the latter proceedings.

### 1. Basic Characteristics of Adhesive Proceedings

Such civil proceedings are, in Croatian scholarship, termed as adhesive proceedings (Croatian *adhezijski postupak*).<sup>91</sup> They are considered to be civil proceedings (*actio civilis*) within the criminal proceedings and, hence, subject to rules of civil substantive law and, in general, to rules of civil proceedings.<sup>92</sup> Following the 2008 amendments to the

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<sup>89</sup> Official Gazette of the Republic of Croatia 152/2008, 76/2009, 80/2011, 91/2012, 143/2012, 56/2013, 145/2013 and 152/2014.

<sup>90</sup> Article 154 of the CrimPA provides that a claim involving an economic interest may be brought by a person entitled to bring such claim in litigation.

<sup>91</sup> Pravni leksikon (Law Lexicon), 2007, p. 12; Pavlović, Zakon o kaznenom postupku (Criminal Procedure Act), 2014, p. 316.

<sup>92</sup> Pavišić, Komentar zakona o kaznenom postupku (Commentary on the Criminal Procedure Act), 2015, p. 204; Kunštek, Actio civilis u kaznenom postupku – prijedlog

CrimPA, types of civil claims that may be adjudicated by the criminal court comprise all claims that may be brought in the civil proceedings, i.e. litigation, including the claim for compensation of damages, return of an object, or declaration of nullity.<sup>93</sup> The criminal court may refuse to rule on the civil claim if that would cause considerable delay in the criminal proceedings. The criminal court may never decide that the civil claim is unfounded and reject it; it may only render a decision upholding the claim entirely or partially, while it will refer the claimant to the separate civil proceedings with regard to the portion of the claim it did not uphold.<sup>94</sup> A decision on the merits in the adhesion proceedings, although rendered by a criminal court, must have all of the elements as the decision rendered by the civil court.<sup>95</sup>

## 2. Scope of Jurisdiction

Given that the Croatian PIL Act does not provide for a specific provision which would resemble the one in Article 7(3) of the Brussels I bis Regulation,<sup>96</sup> a theoretical question arises as to whether such international jurisdiction of Croatian courts exists. Two lines of reasoning may help to resolve this issue.

Firstly, according to Article 27 of the CivPA, international jurisdiction has to be prescribed, *inter alia*, by the statute, whether the PIL Act or another. Jurisdiction in criminal matters is determined by the CrimPA in conjunction with the Criminal Act (CrimA).<sup>97</sup> The court is competent *ratione loci* if the criminal offence was committed or at-

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novele (Actio civilis in the criminal proceedings – reform proposal), in: Pavišić (ed.), *Decenium moztanicense*, 2008, pp. 201-216.

<sup>93</sup> Šago/Plečić, Adhezijsko rješavanje imovinskopravnog zahtjeva u kaznenom postupku (Ancillary Adjudication of Civil Claims in Criminal Proceedings), *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* (Collected Papers of the Law Faculty of the University of Rijeka) 33 (2012), pp. 967-999, especially pp. 977-981.

<sup>94</sup> The situations in which the court may or must refer the claimant to the separate civil proceedings are discussed in detail in the scholarship. See e.g. Pavišić, (fn. 92), p. 213 et seq.

<sup>95</sup> Supreme Court of the Republic of Croatia, Kž-34/07-6 of 22/3/2007.

<sup>96</sup> Such normative choice is not common elsewhere either.

<sup>97</sup> Official Gazette of the Republic of Croatia 125/2011, 144/2012, 56/2015 and 61/2015.

tempted in its territory.<sup>98</sup> Croatian criminal law adopts the ubiquity theory in relation to the crimes committed at distance: The crime is considered to be committed both in the place where the person was acting and in the place where the consequence of such acting was realised. Where more than one person acts in committing the crime, the offence is considered to have been committed also in the place where any of these persons acted and in the place where the consequence was realised.<sup>99</sup> Croatian criminal law also provides for a) extraterritorial jurisdiction in relation to: a1) acts against the Republic of Croatia and similar acts committed by whoever and wherever, as well as acts causing pollution to the environment if committed in the ecological-fishing belt, epicontinental belt or open seas,<sup>100</sup> a2) acts committed by or against Croatian citizens punishable in the country where committed,<sup>101</sup> and b) universal jurisdiction<sup>102</sup> in relation to: b1) acts of foreigner committed abroad and punishable in the country where committed provided they are punishable in Croatia by five or more years imprisonment,<sup>103</sup> b2)<sup>104</sup> genocide, acts against humanity, war crimes, terrorism, torture, slavery or human trafficking, acts which the Republic of Croatia is obliged to prosecute under an international treaty, as well as the criminal offences proscribed in Article 5 of the Statute of the International Criminal Court,<sup>105</sup> criminal offences against values protected by international law and other criminal offences within the jurisdiction of international criminal courts and prosecution for criminal offences against international

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<sup>98</sup> Article 20(1) of the CrimPA.

<sup>99</sup> Article 9 of the CrimA.

<sup>100</sup> Article 13 of the CrimA. This provision enforces the protective principle. *Turković et al.*, *Komentar Kaznenog zakona* (Commentary to the Criminal Act), 2013, p. 36.

<sup>101</sup> Articles 14 and 15 of the CrimA. These provisions enforce the active and passive personal principles. *Turković et al.*, (fn. 100), p. 37 et seq.

<sup>102</sup> The term universal jurisdiction is understood here both in the sense of substantive and procedural law.

<sup>103</sup> Article 17 of the CrimA. This provision enforces what is sometime understood as the universal principle in the wide sense. *Turković et al.*, (fn. 100), p. 37 et seq.

<sup>104</sup> Article 16 of the CrimA. This provision enforces the absolute universal principle. *Turković et al.*, (fn. 100), p. 38 et seq.

<sup>105</sup> Official Gazette of the Republic of Croatia – International Treaties 5/2001.

justice.<sup>106</sup> Jurisdiction under a2) and b1) is restricted where the convicted person has served the sentence or was found not guilty or in the absence of the private indictment necessary for instigating the proceedings in the country where the act was committed.<sup>107</sup> Likewise, jurisdiction under b2) is restricted to cases in which the persecution has not been initiated before the International Criminal Court or the court of another state or no fair trial may be expected in the country where the act was committed.<sup>108</sup> In all these cases (a1), a2) b1) and b2)) the proceedings shall be instigated only if the perpetrator is located on the Croatian territory.<sup>109</sup> Given that the criminal law itself provides for international jurisdiction in certain cases and the provision on adhesive proceedings is not specifically restricted, one may conclude that a civil claim may be applied for in the criminal proceedings regardless of its cross-border character. This interpretation reinforces the rationale of this provision – to enhance the economy of the proceedings.

Secondly, under the last sentence of Article 27 of the CivPA, the Croatian courts shall be competent to decide a cross-border case irrespective of the fact that neither international treaties nor domestic statutes provide for any grounds of international jurisdiction for a specific type of legal matter (a subject-matter international jurisdiction), based on subsidiary application by analogy of the rules on jurisdiction *ratione loci* to the cross-border cases. Arguably, such an analogy in tort cases related to violation of human rights could not be made because tort cases are already covered by Article 53 of the PIL Act. The opposite conclusion would require wider interpretation arguing that the jurisdiction rules *ratione loci* in the Criminal Procedure Act (CrimPA) are equally relevant for establishing jurisdiction. These rules are not only the rules of *ratione loci* jurisdiction in criminal matters, but also in civil matters as they indirectly determine jurisdiction in relation to civil claims raised in the course of the criminal proceedings.

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<sup>106</sup> See Article 1 of the Statute of the International Criminal Court and Persecution of the Crimes against International War and Humanitarian Law Implementation Act, Official Gazette of the Republic of Croatia 175/2003, 29/2004, 55/2011 and 125/2011.

<sup>107</sup> Article 18(2) of the CrimA.

<sup>108</sup> Article 18(3) of the CrimA.

<sup>109</sup> Article 18(4) of the CrimA.

### 3. Related Developments in Case Law and Legislation

Irrespective of the theoretical basis for using the adhesion proceedings with the aim of establishing international jurisdiction in cross-border cases, these proceedings appear to have the potential of being an important instrument facilitating the bringing of corporate offenders before Croatian courts. Two elements relevant for the *ratione materiae* and *ratione personae* scopes of the criminal and thus also adhesion proceedings, add to the potential of the latter:

First is the line of judgments in which the Croatian criminal courts practically “pierced the corporate veil” (with no reference to the CompA) in the criminal law context by holding owners of the companies guilty for economic crimes,<sup>110</sup> such as fraud in commercial operations.<sup>111</sup> Also relevant in the context of this paper might be criminal offences against the health of people,<sup>112</sup> the environment,<sup>113</sup> the public security,<sup>114</sup> etc. By doing so, the Croatian courts open the door for civil redress related to the same criminal offences.

Second is the Legal Persons Responsibility for the Criminal Offences Act (LPRCOA),<sup>115</sup> which provides that a legal person, including a foreign legal person, shall be punished for a criminal offense if that offense violates a duty of the legal person or if the legal person realised or should have had realised, based on that offense, an economic benefit for oneself or another person.<sup>116</sup> Thus, it is possible that the criminal proceedings are brought against domestic (or even foreign)<sup>117</sup>

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<sup>110</sup> Title 24 of the CrimA consists of 20 criminal offences specifically committed in the context of commercial operations.

<sup>111</sup> E.g. Supreme Court of the Republic of Croatia, I Kž 724/01-7 of 3/8/2005; Supreme Court of the Republic of Croatia, I Kž 818/12-9 of 27/11/2013; Supreme Court of the Republic of Croatia, I Kž 324/11-4 of 30/4/2014; Supreme Court of the Republic of Croatia, I Kž 108/13-4 of 15/5/2014; Supreme Court of the Republic of Croatia, I Kž 626/14-6 of 20/11/2015.

<sup>112</sup> See Title 19 of the CrimA.

<sup>113</sup> See Title 20 of the CrimA.

<sup>114</sup> See Title 21 of the CrimA.

<sup>115</sup> Official Gazette of the Republic of Croatia 151/2003, 110/2007, 45/2011 and 143/2012.

<sup>116</sup> Articles 3 and 1(2) of the LPRCOA.

<sup>117</sup> See abovementioned situations of extraterritorial or universal jurisdiction.

companies owning, controlling and/or managing<sup>118</sup> foreign companies. Liability of a company derives from the liability of the person responsible for its operation; hence they both have to be subject to the criminal proceedings. Aside from the option to prosecute a person *in absentia*, a natural person responsible for the operation of the company would have to be in Croatia, or in another EU Member State wherefrom he or she could be relocated to Croatia based on the European Arrest Warrant (EAW).<sup>119</sup> The statistical data regarding the criminal proceedings against legal persons reveal that at first quite moderate rate of court convictions in relation to criminal reports made to the State Attorney tends to increase over time. While in the period from 2005 to 2009 there were 2566 reports, as opposed to only 361 indictments and 208 convictions,<sup>120</sup> in the period from 2010 to 2014 there were 5611 reports to the State Attorney, 1591 indictments and 676 convictions. This means that in the period from 2005 to 2009 out of the total reports there were only 14 % indictments and 8 % convictions, while 58 % of all indictments ended with conviction.<sup>121</sup> In the following period from 2010 to 2014, out of the total reports, 28 % resulted in indictments and 12 % in convictions, with 42 % indictments ending with convictions. These figures show the tendency of total and relative increase in figures, except for the five-year ratio of convictions in the indictments where slight decrease is present. Such changes indicate more openness of the system to effectively deal with criminal liability cases related to corporate activities.

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<sup>118</sup> The companies among themselves may be connected in various ways, and it should not be relevant whether the control is exercised *de iure* or *de facto*, as long as it is possible to prove it.

<sup>119</sup> See 2002/584/JHA: Council Framework Decision of 13/6/2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190 of 18/7/2002, p. 1.

<sup>120</sup> Croatian Bureau of Statistics, Criminal Liability of Legal Persons for Criminal Offences 2005–2009, 2010, [www.dzs.hr/Hrv/publication/studije/Studije-i-analize\\_108.pdf](http://www.dzs.hr/Hrv/publication/studije/Studije-i-analize_108.pdf) (1/12/2015), p. 16.

<sup>121</sup> Croatian Bureau of Statistics, Legal Entities Perpetrators of Criminal Offences, by Type of Decision, 2014, No. 10.1.4., [www.dzs.hr/](http://www.dzs.hr/) (1/12/2015), p. 1.

This having been said, there are certain practical considerations, which tend to weaken the potential of the adhesion proceedings in Croatia in general, not only with respect to the cases falling within the topic of this paper. In the absence of the statistical data regarding the share of claims that were decided upon in the adhesion proceedings in the total amount of claim made in the adhesion proceedings, the random survey made by the authors indicates that this share is quite low.<sup>122</sup> In the prevailing number of cases, the Croatian criminal courts reject the application to decide on the civil claim within the adhesion proceedings. Such rejection is possible if deciding on the civil claim would cause considerable delay in the criminal proceedings. The question naturally rises as to what delay should be regarded considerable. It seems that such assessment should be made on the case-to-case basis. In reality, the criminal courts are prepared to deal with civil matters only in straightforward cases, such as where there was a conviction for fraud for the exact amount of money, which is then ordered to be repaid to the person suffering damage. On the contrary, the courts are in principle not willing to hear adhesion claims entailing taking of evidence which is not necessary for deciding on the criminal liability. This is unfortunate since the institute permitting a civil claim in the context of the criminal proceedings is aimed at not only achieving the efficiency of the court proceedings, but also attaining the purpose of the criminal persecution and conviction.<sup>123</sup> The above-mentioned 2008 extension of the types of civil claims that may be adjudicated by the criminal court was also intended to contribute to both goals.

The unwillingness of the Croatian judges to adjudicate civil claims in the adhesion proceedings is at least to some extent a consequence of the fact that they are under constant pressure to reduce the length

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<sup>122</sup> There is no judgments database in Croatia available publicly which contains all judgments. Therefore, it is impossible to make a survey based on a representative sample.

<sup>123</sup> *Grubišić*, Imovinskopravni zahtjev prema okrivljeniku odgovornoj osobi kada je kaznenim djelom pribavio imovinsku korist za pravnu osobu (An indemnity claim against an accused person who committed a criminal offence as a responsible person of a legal person gaining assets from such offence), *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* (Collected Papers of the Law Faculty of the University of Rijeka) 35 (2014), pp. 741-760, especially p. 745.

of the proceedings. Moreover, under the applicable rules,<sup>124</sup> their performance is of equal value regardless of whether they decide the civil claim in the adhesion proceedings or refuse to do so and leave it to the civil courts (turning the issue of jurisdiction back to the above-mentioned civil grounds for international jurisdiction). Perhaps the Croatian criminal courts, not so willing to engage into deciding the civil cases (especially if they are more complex), could be motivated to reverse their practices if their efforts are properly recognised in the system of judicial performance evaluation. In a view of the overall advantages of the adhesion proceedings and recent legislative efforts to intensify their use, it would be advisable to recognise the judges' work where they decide to deal with the adhesion proceedings by adding credits to their performance account.

## **H. Forum Necessitatis**

In 2011, the Croatian Government has established the Working Group to draft the new Croatian PIL Act. The draft version of October 2015 contains a provision on *forum necessitatis*. If this provision survives the legislative process, the Croatian courts shall be competent against defendants not domiciled in the EU if: 1. the proceedings cannot be conducted abroad or it would be unreasonable to expect that the proceedings be conducted there, and 2. the subject matter of the proceedings is sufficiently closely connected to Croatia that it is reasonable to conduct the proceedings in Croatia.

Because this provision would be entirely new in Croatian private international law it is difficult to offer any guidance or explanations at this point. Nevertheless, its potential in the civil cases related to a violation of human rights abroad seems sufficient to merit its mention in this paper.

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<sup>124</sup> See Metodologija izrade ocjene sudaca (Methodology for Evaluation of Judges), [www.dsv.pravosudje.hr/index.php/dsv/propisi/metodologija\\_izrade\\_ocjene\\_sudaca](http://www.dsv.pravosudje.hr/index.php/dsv/propisi/metodologija_izrade_ocjene_sudaca); and Okvirna mjerila za rad sudaca (Framework Criteria for the Performance of Judges), <https://pravosudje.gov.hr/UserDocImages/dokumenti/Pravo%20na%20pristup%20informacijama/Zakoni%20i%20ostali%20propisi/Okvirna%20mjerila%20za%20rad%20sudaca.pdf> (1/12/2015).



## I. Conclusion

An analysis of the EU and particularly Croatian national rules on jurisdiction reveal several grounds on which civil claims for corporate related human rights violations committed abroad may be adjudicated before Croatian courts. Due to the fact patterns in these cases, the classical heads of jurisdiction based on the defendant's domicile and place where the harmful event occurred are rendered essentially immaterial. Conversely, the jurisdiction by attraction of wrongdoers as co-defendants in the same proceedings, where at least one of them is domiciled in Croatia, seems to be of high importance. Especially in conjunction with a claim aimed at piercing the corporate veil, the jurisdiction by attraction may be a likely instrument for bringing such claims before Croatian courts. This having been said, one should be aware of the Croatia's limited potential in serving as a jurisdictional venue in cases of jurisdiction by attraction due to its economy not as developed as in western EU Member State and a few companies or corporations operating on an international level, they being rather regionally oriented. Although the forthcoming amendments to the PIL Act might remove the basis for adjudicating based on attraction in national law (extending the *ratione personae* scope of application of the Brussels I bis Regulation irrespective of the defendant's domicile), they might bring about another potentially important basis – *forum necessitatis*. Whether its interpretation will stretch wide enough to capture the incidents amounting to violations of human rights committed by TNCs abroad, and, if so, under which specific conditions, is however hard to predict.

Another jurisdictional basis for civil claims arising out of the corporate related human rights violations abroad, and the one with some gravitational potential towards Croatia, is the adhesion civil proceedings before the Croatian courts seized with the corresponding criminal proceedings. Two different aspects require special emphasis. First, there is some uncertainty as to this jurisdictional basis owed to the absence of a specific provision in the PIL Act. The rules on criminal procedure provide for adhesive jurisdiction without special reference to cross-border situations. While this appears to be easily overcome in cases where the criminal law provides for universal jurisdiction, the remaining cases might be less straightforward. However, following the interpretation proposed in this paper, such jurisdiction is likewise possible in all cross-border cases. Building on that assumption, the

links in the chain of legal base include the Criminal Act, the Criminal Procedure Act and the Legal Persons Responsibility for Criminal Offences Act. Jointly, they create the basis for adjudicating civil claims in the context of criminal proceedings for acts committed abroad by both Croatian and foreign companies. Broadest basis but perhaps less important practically is the universal jurisdiction for adjudicating international crimes, under condition of presence in the Croatian territory (or in another EU Member State, if the EAW is effectively used). Furthermore, Croatian courts have jurisdiction to adjudicate in a criminal, and thus also in a related civil case, against a foreign company owned by a Croatian company. It is likewise possible to bring before a Croatian criminal court a case against a foreign company owned by foreign company. In both situations the persecution is possible provided that the company/company's director (or another responsible person therein) is present in Croatia (or in another EU Member State, if the EAW is effectively used) irrespective of his or her nationality or domicile, and that the criminal offense at stake is punishable in the country where committed, as well as in Croatia (in Croatia by no less than five years of imprisonment). The second emphasis is on the practical considerations revealing that only a small number of cases in which application are made to the criminal court to decide on the civil claim end with a decision on the merits. In the vast majority of cases the civil claim would have to be brought before the civil court, meaning that merely the civil jurisdiction bases may be relied on. In the light of the legislative amendments aiming at intensifying the use of adhesion proceedings, the complementing amendments to the rules on evaluating the judges' performance could be welcome.