

Section 8: Criminal Responsibility of Legal Persons

Article 19: Criminal Responsibility of Legal Persons

1. A legal person is criminally responsible for a criminal offense:
 - (a) committed in the name of, on behalf of, or for the benefit of a legal person;
or
 - (b) committed by any natural person, acting either individually or as part of an organ of the legal person, who has a management or supervisory position within the legal person based on:
 - (i) a power of representation of the legal person;
 - (ii) an authority to take decisions on behalf of the legal person; or
 - (iii) an authority to exercise control within the legal person.
2. A legal person is also responsible for a criminal offense where the lack of due supervision or control by a natural person, referred to in Paragraph 1(b), has made possible the commission of the criminal offense for the benefit of the legal person.
3. The responsibility of a legal person under Paragraphs 1 and 2 does not exclude criminal proceedings against a natural person who is responsible as the perpetrator of a criminal offense or who has participated in the criminal offense.

Commentary

The old maxim that a corporation cannot commit a criminal offense is no longer entirely valid based on practice at the domestic and international levels. Originally, because criminal law focused on assigning moral culpability for the commission of certain acts, it was considered inappropriate that a legal person (such as a business or corporation), incapable of moral culpability, could be subjected to it. This idea has changed greatly, particularly in response to current crime trends in which serious criminal offenses such as organized crime, corruption, money laundering, and the financing of terrorism are perpetrated through corporate entities as well as through individuals. Given the complex structures of corporate entities, it is sometimes difficult to identify a natural person who is the perpetrator of the criminal offense. The introduction of legal provisions in domestic law that provide for liability of legal persons serves to address the difficulty of identifying the natural person who is the perpetrator, to tackle serious criminal offenses perpetrated by those who try to shield their criminal conduct through the use of corporations, and to target the assets of a corporation used as a front for criminal conduct.

At a domestic level, an increasing number of states are implementing legislation that provides for corporate criminal liability or criminal liability of legal persons. This trend is evidenced particularly in newly drafted criminal codes from post-conflict states such as Kosovo and Bosnia and Herzegovina. At an international level, an increased number of international and regional conventions have included obligations upon states parties to implement or to consider implementing provisions in domestic legislation providing for liability of legal persons. These conventions include the United Nations Convention against Transnational Organized Crime (Article 10); the United Nations Convention against Corruption (Article 26); the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials (Article 2); the Council of Europe Criminal Law Convention on Corruption (Article 18); and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime and on the Financing of Terrorism (Article 10). A similar recommendation is made in *The Forty Recommendations* of the Financial Action Task Force (Recommendation 2).

In some domestic jurisdictions, corporate criminal responsibility is ascribed through civil or administrative laws and not through criminal laws. Recognizing this fact, most international conventions do not specifically require that criminal liability over legal persons be asserted by states parties to the convention; civil or administrative liability will suffice to fulfill the criteria of the convention. The drafters of the MCC chose to introduce criminal liability based on the fact that, of late, many commentators have argued against the effectiveness of civil or administrative liability of legal persons. Instead, they have supported moves to bring liability into the criminal realm. Criminal law is seen as a better deterrent than civil law or administrative law alone. As stated in the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (page 116, paragraph 240), "Criminal liability of a legal entity may also have a deterrent effect, partly because reputational damage can be very costly and partly because it may act as a catalyst for more effective management and supervisory structures to ensure compliance." In addition, the

capacity to impose and enforce administration sanctions against criminal organizations will often be far more limited in a post-conflict environment than the potential to confront their activities through criminal prosecution.

The wording of Article 19 is taken from Article 10 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime and on the Financing of Terrorism. Reference should be made to paragraphs 103–109 of the explanatory report to the convention for a discussion of the meaning of this provision. Useful reference can be made to the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pages 115–130, which discusses the issue of liability of legal persons and includes samples of domestic and international legislation on this topic.

The crux of Article 19, as is the crux of the doctrine of corporate criminal responsibility, is that a legal person can be held liable for the acts of its officers in certain cases. There are a number of theories under this form of criminal liability, such as the “directing mind principle,” vicarious liability, and a holistic theory of liability. Under the latter, a company and its procedures and culture can create a dangerous environment in which offenses can occur, and therefore the company is held directly responsible for the criminal act. Under vicarious liability, another form of liability used in a domestic context, the company is responsible for the actions of all of its actors. This is generally a concept used within the context of civil law that has been adopted by criminal law in the context of corporate criminal responsibility. The theoretical underpinning of Article 19 is that of the directing mind principle. It holds that a certain limited number of officers of a legal person act with a requisite degree of authority and control in the legal person so as to make it appropriate to attribute their actions to that of the company. In the context of the directing mind principle, Article 19 sets out a definition of persons whose actions are attributable to the legal person under Paragraph 1(b). It is a matter for judicial interpretation how far down the chain of command in a company the doctrine of criminal responsibility for a company will stretch.

When a court determines that a legal person is criminally responsible for a criminal offense, the legal person is subject to certain penalties, many of which are specific to legal persons. Reference should be made to Section 12, Subsection 4, for a discussion of the particular penalties applicable to a legal person and the rationale for including them in the MCC.

The term *legal person* is not defined in the MCC. The definition will be a matter for judicial interpretation and will also very much depend on the company/corporations/business enterprise law in place in the state. Drafters in post-conflict states may consider including a definition in their criminal legislation that is consistent with other bodies of domestic law. The definition may include corporations, companies, associations, firms, partnerships, and other business enterprises in the state.

It is worth noting that Article 19 applies to all criminal offenses, including genocide, crimes against humanity, and war crimes. There was some discussion of and support for including criminal responsibility of legal persons in the Statute of the International Criminal Court. However, it proved too difficult to reach agreement on the modalities of corporate liability within the limited time available for discussion, and the concept was dropped in the final stages of the negotiations on the statute in order to ensure consensus.

Reference should be made to Chapter 6 of the MCCP, which deals with procedural issues relating to the prosecution of a legal person, including the designation of a representative for the legal person, service of documents on a legal person, and other provisions relating to the indictment and trial of a legal person.

In addition to including the provisions of Article 19 of the MCC and Chapter 6 of the MCCP in its domestic legislation, a state should consider legal reforms outside of criminal law vis-à-vis legal persons. It is important that an adequate body of company law/corporate law/laws on business enterprises is developed in a post-conflict state so that all the actors know of their obligations and the consequences of failure to comply. Such a body of law is also extremely important for a state wishing to attract international businesses to its territory.

Paragraph 2: This paragraph introduces negligence to the issue of criminal responsibility of legal persons. Article 18(4) of the MCC provides that a person, meaning a “natural person” or a “legal person,” may be held liable on account of negligence only when it is provided for in the MCC. With regard to a legal person, Article 19 sets out the principle that a legal person is liable for the negligent commission of any criminal offense contained in the MCC when one of the actors described in Paragraph 1(b) is negligent with regard to his or her supervision or control.

Paragraph 3: The prosecution of a person for his or her participation in a criminal offense does not preclude the prosecution of the legal person for the same offense. The reverse is also true; a person may be prosecuted subsequently even where a legal person has been held criminally liable for the same offense, or even been acquitted. As mentioned in the commentary to Article 8 on *ne bis in idem* (double jeopardy), no issues relating to double jeopardy arise, as the legal person and the natural person are different, and double jeopardy applies only to one particular person being prosecuted twice for the same criminal offense. Reference should be made to the commentary on Article 8.