



## ARGENTINA

### SURVEY QUESTIONS & RESPONSES<sup>1</sup>

Survey conducted as part of *Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities*.

#### **I. Disclosure requirements for business entities**

**1. What sort of material information are business entities required to provide to their shareholders and/or public under your jurisdiction's company law or securities laws that may be relevant to potential litigants? For example, are such entities required to provide information about:**

- **material civil litigation?**
- **risk factors that would impact a shareholder's investment in the company?**
- **any reported violations of law or pending proceedings arising from such violations?**
- **revenues received from, or amounts paid to or on account of, a government or its officials or agents?**

According to the Statute which regulates legal persons (Ley N° 19.550 de Sociedades Comerciales, articles 55 and 294, par. 6), shareholders have the right to

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<sup>1</sup> The initial responses to this survey of Argentina law were provided by Tomás Ojea Quintana, Attorney-at-law, Abuelas de Plaza de Mayo, Argentina. Comments on the responses have been provided by Santiago Otamendi, Judge, Buenos Aires and Director of the NGO *Unidos por la Justicia*. The contents of this survey response are intended for research purposes only and continue to be revised in light of peer review. The contents of this survey response are in no way intended as comment on specific cases or judgements, nor are they intended as legal advice on any of the issues covered. Due to constraints of space, many responses in this text provide only a basic introduction to the issue and the complexities of specific cases or provisions may not be fully explicated. Readers seeking practical legal advice should consult a lawyer in the relevant jurisdiction. Citations and references to this survey response should adhere to the following format: "Survey Response, Laws of Argentina (Tomás Ojea Quintana), 'Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions' Fafo AIS, [date accessed] 2006". The contents of this survey response are published by Fafo AIS under a Creative Commons Attribution-Share Alike 2.5 License.

access --through the administrator-- to any information connected to the activities and functioning of the business entity, except to commercial or industrial secrets (know how).

Public do not have the right to access directly to information from the business entity, but, through a lawyer, they have access to balances and financial reports that companies have to present before a public office (Inspección General de Justicia).

## **2. Is there a right to know statute enabling one to obtain information from your government?**

First, it has to be said that our National Constitution recognizes in general terms a right-to-know or access to public information. International human rights covenants, that have constitutional status, recognize this right as well. However, the Congress has not passed a law regulating this right so far. Consequently, there is no right-to-know Statute in Argentina (some Provinces, i.e. States, such as Buenos Aires, Córdoba, Mendoza, Chubut, Santa Fe, Ciudad Autónoma de Buenos Aires, and some Municipal Governments, have a right-to-know State Statute).

The Executive Branch, to cover the absent of a Statute, has issued a Presidential Decree (Decreto Presidencial) N° 1172/03 which in fact regulates the exercise of a right-to-know, but only before the Executive Branch. Therefore, under the procedure of this Decree, all individuals have the chance to articulate access to public information before any office of the Executive.

This Decree establishes some exceptions for the obligation to provide information, most significantly:

- a. in case of industrial, financial, commercial, technical and scientific secret (understanding secret not as “confidential”);
- b. if information can risk the correct and normal functioning of financial and bank system

Article 43 of the National Constitution creates the legal mechanism of Habeas Data. It establishes that “Any person shall file this action in order to obtain information of the data about himself and their purpose, registered in public records or databases, or in private ones intended to supply information; and in case of false data or discrimination, this action may be filed to request the suppression, rectification, confidentiality or updating of said data. The secret nature of the sources of journalistic information shall not be impaired”. The legal action of Habeas Data has been regulated by law No. 25.326.

The writ of Habeas Data is not a right-to-know Statue; it only provides the individual with an action to access to information about himself that is in government hands, as well as the right to modify such information if it is false or not correct.

The writ of Habeas Data has never been used to try to open other files than ones related to one’s own self.

There also exists a law of access to environmental information, which guarantees public access to reports and studies on the environment and, in particular, permits access to legal documents from court cases involving the environment where business entities are involved.

On the other hand, there are several laws regulating the secrecy of information related to financial affairs, banking and the stock market

## **II. Status of business entities under criminal law in ARGENTINA**

### **3. Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?**

Our Criminal Code, as a product of its time, does not contain any norm which in a general and express manner contemplates the possibility of a legal person (such as a business entity) being prosecuted.<sup>2</sup> However, reflecting developments elsewhere in the world, the notion that only physical persons could be object of legal sanctions of a penal character has varied over time in our legal system, a sign of flexible evolution of norms in adaption to changing historical circumstances.

Currently there is a range of differing opinions on this subject, including those that reject the possibility of holding legal entities criminally responsible, and those that accept it. I would argue that the idea of criminal responsibility of legal persons has passed from theory to practice, as it has been recognized not only by specialized laws (especially concerning issues of economic and fiscal character, as we shall later see) but also in jurisprudence.

In this sense there are numerous laws which provide for sanctionary measures being taken in cases of offences committed by legal persons.<sup>3</sup>

Among legal norms currently in effect we have several norms on criminal conduct included in ordinary laws, through which penalties are established for commission by legal persons of specified acts. That is the case with the following laws: No. 20.680 (on

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<sup>2</sup> It should be noted that the scholarly doctrine that postulates the inadmissibility of criminal capacity of legal persons, in part bases its position on the fact that article 34 of the Criminal Code clearly refers to "human action", something which, according to this doctrine, highlights the validity of the principle "societas delinquere non potest" in our Penal Code. (Among others: Zaffaroni, Raúl E. *Tratado de Derecho Penal, Parte General*. Ediar, Buenos Aires (1998) vol. III, p. 57.

<sup>3</sup> The reason that the legislative has established criminal sanctions for certain types of actions performed by "ideal subjects", in accordance with the terminology employed by the Supreme Court of Justice, is the appearance of complex forms of crime, in which persons make use of diverse kinds of collective entities to infringe on the economic-financial order of the State. This kind of actions have led to the assertion of criminal responsibility of these persons of ideal (non-physical) existence, as the only way of preventing the violation of valuable legal assets, giving priority to the defence of society and its legal security.

supplying), 25.156 (on protection of competition), 22.415 (Customs Code) and 23.554 (national defense).

Finally, certain conduct by “ideal” (not physical) persons is characterized as punishable in the specialized criminal legislation. This is the case with law No. 13.985, which specifies behaviour which attacks national security; 19.359 (penal regime of foreign exchange); 24.192 (on prevention and repression of violence in sports events); and 25.246, (Hiding or laundering assets of criminal origin)

In my judgment, and even for the limited purpose of informing the Assembly of States Parties as to how the various states in the world treat juridical persons, the survey should characterize Argentine law as a legal system where legal persons are not subject to criminal liability.

Even though there are a few special criminal laws that apply to juridical persons, that might be comparable to also few crimes contained in the Rome Statute (mainly some very few war crimes), the main Penal Code, the precedents of the Judiciary, and the academic and theoretic framework, are far from establishing forms of criminal liability of juridical persons which can be applied before courts.

#### **4. What type sanctions are applied to business entities, as opposed to natural person**

Article 5 in Title II of the Penal Code states: “the penalties established by this Code are the following: imprisonment, fines and inhabilitation.” In the case of juridical persons, we must apply the penalties specified in each of the laws that contemplate the punishment of such entities.

These are:

##### **Ordinary laws**

##### **Law 20.680 – Supplying**

Enacted 24 June 1974, Published in the official Gazette (Boletín Oficial) on 25 June 1974. Its text has been updated in accordance with the laws 21.845 and 23.344. Article 4 of decree 2284/91, published in the official Gazette 1 November 1991, suspends the exercise of the faculties given by law 20.680. The right to exercise any or all of the measures provided for by law 20.682 can only be re-established by prior declaration by the Congress of the Nation of emergency of supply, whether it be on national or regional level or within a certain sector only.

**Art. 8** When the infringements that are declared punishable by this law are committed to the benefit of a legal person, association or society, it will be considered party to the infringement, without detriment to the personal responsibility of the perpetrators. In cases where a legal person, association or society is sentenced, the loss of legal status and the expiry of any prerogatives that

have been awarded can be imposed as a complementary sanction. The directors, administrators, managers and members of such entities that have not participated in the commitment of the criminal actions, but which because of their function should have known about and could have opposed them can, if serious negligence is proven, become subject to the sanctions contemplated in article 5 a) and b), reducing to a fourth part the minimum and maximum limits for the punishment.

#### **Law 25.156 – Defence of competition**

Sanctioned on 25 August 1999, partially enacted on 16 September 1999, published in the official Gazette on 20 September 1999.

**Art. 46** Persons of physical or ideal existence that do not comply with the regulations of this law, shall be subject to the following sanctions: a) The cessation of the acts or conducts described in Chapters I and II and, where applicable, the un-doing of their effects; b) Those that perform the prohibited acts included in Chapters I and II and in article 13 of Chapter III, shall be imposed a fine of between ten thousand pesos (\$ 10.000) and a hundred and fifty million pesos (\$ 150.000.000), which shall be determined on the basis of: 1. The loss incurred by all persons affected by the prohibited activity; 2. The benefit obtained by all persons involved in the prohibited activity; 3. The value of the assets involved of the persons indicated in point 2 at the time of the infringement. In case of repeated offences, the amounts of the fines shall be doubled. c) Without detriment to other sanctions that may be applicable, whenever acts can be verified that consist in abuse of dominant position or the consolidation of a position of a monopoly or oligopoly in violation of the regulations of this law, the Tribunal can impose the fulfilment of conditions with the aim of neutralizing the aspects distorting competition, or **ask the corresponding judge to dissolve, liquidate, de-concentrate or divide the infringing companies**; d) Those that do not comply with the regulations included in articles 8, 35 and 36 shall be subject to a fine of up to a million pesos (\$ 1.000.000) daily, counted from the expiry date of the obligation to notify of the projects of economic concentration, or from the moment the order or agreement of cessation or abstention is violated. This is without detriment to any other sanctions which may apply.

**Art. 47** The persons of ideal existence are attributable to the conducts carried out by physical persons acting in the name of, with the help of or for the benefit of the person of ideal existence, even in cases when the action that was the basis for the representation is ineffective.

**Art.48** When the infringements contemplated in this law are committed by a person of ideal existence, the fine shall also be applied jointly and severally to the directors, managers, administrators, trustees or members of the Board of Control, agents or legal representatives of said person of ideal existence, who through the exercise or omission of their duties of control, supervision or vigilance have contributed to, encouraged, or permitted the commitment of the infraction.

In such cases, a complementary sanction of disqualification from engaging in commerce for a period of between one (1) to ten (10) years may be imposed on the person of ideal existence as well as the persons listed in the previous paragraph.

**Art 49** When determining the size of the fines, the tribunal must consider the seriousness of the infringement, the damage caused, the indicia of intentionality, the participation of the perpetrator in the market, the size of the affected market, the duration and concentration of the practice, the existence of previous offences as well as the economic capacity of perpetrator.

### **Law 22.414 – Customs Code**

Enacted on 2 March 1981; published in the official Gazette 28 march 1981. Entered into force 23 September 1981, in accordance with its article 1186. Its current text recognizes the modifications of laws no. 23.353, 24.415 and 25.986.

#### **Title I “Customs Crimes”**

**Art. 876, 1.** In the situations described in articles 863, 864, 865, 866, 871, 873 and 874, in addition to the penalty of incarceration, the following sanctions shall be applied:

- a) The confiscation of the merchandise that is the object of the crime. When the owner or the person who legally disposes of the merchandise is not to be held responsible for the crime, or when the merchandise cannot be apprehended, the confiscation shall be substituted with a fine equal to its value, to be imposed jointly and severally.
- b) The confiscation of the medium of transport and any other instruments employed in the commitment of the crime, except where they belong to a person unrelated to the situation and which the circumstances of the case show cannot have had knowledge of their illicit use.
- c) A fine of between four and twenty times the current value of the merchandise object of the crime, to be imposed jointly and severally.
- d) The loss of any concessions, special regimes, privileges and prerogatives the perpetrator may have enjoyed.
- e) The disqualification from engaging in commerce for between six months and five years.
- f) Special perpetual disqualification from exercising as customs agent, member of auxiliary customs police or of the security forces, customs officer, agent of customs transport or supplier to any medium of international transportation, and as agent or dependent of any of the last three categories.
- g) Special disqualification for between three and fifteen years for exercising import or export activities. For the sanction included in this subsection as well as in subsection f), it shall be the rule that when a person of ideal existence is responsible for the crime, the special disqualification provided for shall be extended to its directors, administrators and member partners of unlimited

- responsibility. Those that it can be proved have had no knowledge of the matter or who have opposed it shall not be held responsible.
- h) The absolute disqualification for twice the time of the punishment to exercise as public functionary or employee.
  - i) The withdrawal of legal status and, where applicable, cancellation of the inscription in the Public Register of Commerce, in cases of persons of ideal existence.

2. When dealing with situations such as described in articles 868 and 869, in addition to the imposition of fines the sanctions established in subsections d), e), f), g) and i) of paragraph 1 of this article shall be applied. In the case of the sanction of subsection f), the disqualification shall have a duration of fifteen years.

Art 887 Persons of visible or ideal existence are jointly responsible with their dependents for the pecuniary punishments that may correspond to them for the customs crimes these have committed in the exercise of or occasioned by their functions.

Art. 888 When a person of ideal existence is sentenced for a customs crime and doesn't come forth with the full amount of the pecuniary penalty it is ordered to pay, its directors, administrators and member partners of unlimited responsibility will be held responsible, jointly and severally and with regard to their personal assets, for the fulfillment of the payment of the fine.

From Title II, the following articles have relevance to customs infringements:

Art. 903 Persons of visible or ideal existence are responsible jointly and severally with their dependents for the customs infringements that these have committed in the exercise of or occasioned by their functions.

Art 904 When a person of ideal existence is sentenced for an infringement and doesn't come forth with the full amount of the pecuniary penalty it is ordered to pay, its directors, administrators and member partners of unlimited responsibility will respond jointly and severally with the ideal person for the fulfilment of the payment of the fine.

**Art 909** In the case of any infringement committed by the transport contractor or by the persons for whom the transport contractor must answer, the customs service may direct the corresponding legal action against the agent of customs transport representing the contractor. In this case, if the agent of customs transport is a person of ideal existence, the measures provided for in article 904 shall not be applied.

Art 910 With the exception of the National State, the provinces, the municipalities and their respective centralized divisions, state entities, whatever the juridical

form they may adopt, shall not enjoy immunity of any kind with relation to responsibility for customs infringements.

### **Law 23.554 – National Defence**

Enacted on 26 April 1988, published in the official Gazette on 5 May 1988.

**Art.36** He who refuses, withholds, falsifies or with undue delay presents information ordered by the competent authority, or who inhibit, rejects or attempts to avoid the requirement, shall be punished with prison for two months to two years, unless the act of providing the information would signify the commitment of a more serious crime. Legal persons of ideal existence that commit the same actions or impede or inhibit the functions of the competent authorities, may be placed under administration of the Executive Power and have their legal status rescinded temporarily or permanently.

### **Special criminal laws**

#### **Law 13.985 – Crimes against National Security**

Enacted on 11 October 1950, published in the official Gazette of 16 October 1950. Modified by Law 16.648 and derogated by Law 21.338, recuperated its validity by way of Law 23.077. The text is still valid, although modifications were introduced by Law 24.198.

**Art. 12:** “The following shall be subject to the same punishment established for the perpetrators of the crimes included in this law:  
(...) d) Those who help, finance or contribute to finance the carrying out of the crimes. If it is a legal person it shall be subject to having its legal status rescinded, without detriment to the personal responsibility of the guilty members (...)”

#### **Law 19.359 – Criminal Regime of Foreign Exchange**

Sanctioned on 9 December 1971; ratified by Law 20.059 and modified by laws 20.184, 22.238, 23.928 and 24.144. Text ordered by decree 480/95, published in the official Gazette on 25 September 1995.

Art. 2: “The infringements specified in the previous article shall be sanctioned such:

- f) When the act has been carried out by the directors, legal representatives, agents, managers, trustees or members of the Board of Control of a person of ideal existence, with resources facilitated by this entity or obtained from it to this end, in the manner that the act is committed in the name of, with the help of or for the benefit of said entity, the person of ideal existence shall also be sanctioned in conformity with subsections a) and e).  
The fine shall be imposed jointly and severally on the assets of the ideal person as well as the personal assets of the directors, legal representatives, agents, managers, trustees or members of the Board of Control that have been involved in the commitment of the criminal act (...)”.

**Law 24.192 – Legal Regime against violence in sports events**

Partially enacted on 23 March 1993 and published in the official Gazette on 26 March 1993.

**Art. 11:** Whenever any of the crimes contemplated in this chapter is committed by a director or administrator of a sports club, or by the head or a member of the Board or of a subcommittee, in exercise of or occasioned by his functions, he shall be removed from office, as well as fined from a hundred thousand (\$ 100.000) to a million pesos (\$1.000.000).

**The sporting entity, to which the person belongs, shall be held responsible jointly and severally for the corresponding pecuniary punishment.**

Without detriment to the aforementioned sanction the judge may, by way of reasoned resolution order the closure of the stadium for a period of up to sixty (60) days.

**Law 25.246 – Hiding or laundering assets of criminal origin**

Sanctioned on 13 April 2000, enacted on 5 May 2000, partially vetoed by decree 370/2000 and published in the official Gazette on 11 May 2000.

**Chapter IV: Criminal Administrative Regime**

Art. 23.1. The legal person whose executive organ employs assets of criminal origin with the possible consequence of giving them the appearance of being of licit origin, in the sense of article 278, subsection 1 of the Penal Code, shall be sanctioned with a fine amounting to two (2) to ten (10) times the value of the assets that are the object of the crime.

The crime shall be considered consummated when the value limit established by that legal regulation has been exceeded, even when the different interrelated incidents which together would exceed that limit, have been carried out by different physical persons without prior agreement between them, and for which reason they couldn't be subjected to criminal proceedings;

2) When the same act is committed because of temerity or serious imprudence of the executive organ of a legal person or of various of its executive organs in the sense of article 278, subsection 2) of the Penal Code, the fine imposed on the legal person shall range from twenty percent (20%) to sixty percent (60%) of the value of the assets that were the object of the crime.

3) When the executive organ of a legal person, in its condition as such, have carried out the crime referred to in article 22 of this law, the legal person shall suffer a fine in the range of ten thousand pesos (\$ 10.000) to a hundred thousand pesos (\$100.000).

**Art. 24. 1):** The person that, acting as executive organ of a legal person or a person of visible existence, and which fails to comply with any of the obligations of providing information to the Unit of Financial Information created by this law, shall be sanctioned with a fine in the range of one to ten times the total value of

the assets or operation the infringement refers to, except when compliance would entail committing a more serious crime.

2) The legal person in whose organism the infringing subject carries out his functions shall suffer the same sanction.

3) When the real value of the assets cannot be established, the fine shall be between ten thousand pesos (\$10.000) and a hundred thousand pesos (\$100.000).

### **Law 24.051 – Dangerous Waste Material**

Sanctioned on 17 December 1991, enacted on 8 January 1992, published in the official Gazette on 17 January 1992.

Art. 49: Any infringement of the normative content of this law, its regulatory document or any complementary norm that may be dictated as a consequence of this law, shall be suppressed by the authorities with the application of the following sanctions, which may be cumulative:

- a) Official warning
- b) Fine of fifty million australes (50.000.000) convertible- Law 23.928- to up to a hundred (100) times that sum.
- c) Suspension of the inscription in the Register for a period between thirty (30) days up to one (1) year.
- d) Cancellation of the inscription in the Register.

These sanctions shall be applied regardless of the civil or criminal responsibility that may be imputed to the offender.

The suspension or cancellation of the inscription in the Register entails the cessation of activities and the closure of the establishment or the premises.

As stated above, our Penal Code does not contain any norm which defines the “juridical person”, nor any norm which contemplates the notion of “person” as a subject of criminal law.

In our legal system it is the Civil Code which, in its article 33, defines the legal person: “All entities which can claim rights or contract obligations, that are not persons of visible existence, are persons of ideal existence or legal persons”.

It can be inferred from this that legal persons, together with persons of real existence, form the genre of “persons” which is regulated by the Civil Code.<sup>4</sup>

### **5. What are the standards applied in your jurisdiction for attributing liability to a business entity for the actions of individual servants? For example:**

#### **a. What must one demonstrate in order to convince the court that the actions of the servants of the**

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<sup>4</sup> It is worthy of note that the author of the Argentine Civil Code, Dalmacio Vélez Sarsfield, adopted the “theory of fiction”, which rejects that a legal person/entity can have autonomous legal status, and holds that this status can only be justified by the actions of the physical persons that the entity is made up of.

**business entity may be attributed to the business entity to establish the guilt of the business?**

- b. If, in order to find a business entity guilty of a crime, the court must find that the business entity intended to carry out an activity that is a crime, how must the prosecution demonstrate that such intent (mens rea) was present? ; and**
- c. What are the standards applicable in your jurisdiction for attributing the criminal liability of a business entity to the servants of the business entity?**

Without detriment to the considerations set out in the previous points, and starting from the fact that our legal system does not include a general disposition that includes the possibility of attributing criminal responsibility to legal persons in such a way as to make applicable to them the postulates of the theory of crime, it is interesting to look at the solutions that national legal scholars propose to this problem.

Of the legal scholars who look favourably on the recognition of criminal responsibility of legal persons we can cite Norberto A. Spolansky. When considering whether an individual servant, in failing to comply with his duty, has carried out an act representative of the will or practice of the legal entity he represents, Spolansky proposes that the background and modalities of the case must be taken into account. In accordance with this position, a legal entity whose representative(s) have committed a criminal act, and who wishes to avoid legal sanction must prove that the act did not constitute the will or habitual practice of the legal person/entity. To do this they must prove, in accordance with the laws regulating the matter, that they opposed the act and denounced it to the appropriate social, administrative and judicial authorities.<sup>5</sup>

David Baigún constructs his proposal from a system of double imputation and suggests that as an additional measure for establishing liability, it must be established who obtains an economic benefit from the commission of the criminal act, whether it is the individual servant or the business entity.

The absence of any benefit on the part of the corporation, even the coexistence of a social role in the beneficiary of the infringement, as long as it doesn't amount to an infraction, excludes all possibility of attributing criminal responsibility to the corporation, as these circumstances, far from specific, constitute the negative aspect of attributability.<sup>6</sup>

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<sup>5</sup> See SPOLANSKY, Norberto, "Culpabilidad, la responsabilidad solidaria de las sociedades anónimas y la de sus directivos en el régimen penal cambiario (el caso del Banco Santander)", in *La Ley*, 1978-D-231, p. 246.

<sup>6</sup> See BAIGÚN, David, "La categoría responsabilidad social en la responsabilidad penal de las personas jurídicas", *Revista Brasileira de Ciências Criminales, publicação oficial do Instituto Brasileira de Ciências Criminales*, año 5, n° 18, abril-junio, 1997, p. 304 and following.

Esteban Righi considers that the the question of punishment of legal persons is imposed by considerations of criminal policy, and holds that this type of punishment requires certain suppositions. For example, the elaboration of a theory of crime which fits the special characteristics of an ideal (non-physical) entity. The author concludes that the assumption of criminal liability of a legal person would be centred around the following points:

- a) The commission of a crime by a member forming part of the legal person;
- b) However, should the actor executing the crime be merely a dependent of the legal person it does not preclude criminal liability of the legal entity, as long as the other members of the society have had knowledge of the criminal act without having done anything to prevent it.<sup>7</sup>

As we mentioned in Question Four, even though as a general rule legal persons are not accountable for ordinary crimes, there are some special criminal laws where legal persons can be hold liable. Under these laws, in order to attribute acts of servants to business entities, one must prove, generally, that servants acted in name, with the help or in benefit of the business entity.

However, it has to be said that under civil law (tort claim for example), as a general rule, acts of servants are directly attributed to the business entity (see Question Seventeen).

- 6. Under your criminal law (penal code) what is the legal standard for convicting someone of being an accomplice to or aiding and abetting the commission of a crime by another (complicity)? What is the legal standard for convicting someone of plotting with another to commit a crime (criminal conspiracy)?**

## **Penal Code**

### **Title VII – Criminal participation**

**Art. 45** – Those that have taken part in the execution of the criminal act or aided the perpetrator or perpetrators in such a way that without it the act couldn't have been committed, shall suffer the punishment established for the crime. The same punishment shall apply to those that directly made someone commit the crime.

**Art 46** – Those that cooperate in any other way with the execution of the crime and those that provide help after the crime, fulfilling promises made before the fact occurred, shall suffer the punishment corresponding to the crime, reduced to between a third part and half. If the punishment is of indefinite imprisonment, incarceration from fifteen to twenty years shall be applied, and if it is a case of life

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<sup>7</sup> See RIGHI, Esteban, “Los delitos económicos”, Ad-Hoc, Buenos Aires, 2000, p. 125.

imprisonment, incarceration of ten to fifteen years shall be applied. (Author's note: Original text in accordance with Law 23.077)

**Art. 47** – If in the particular circumstances of the case it becomes clear that the person accused of complicity did not agree to cooperate with the crime committed by the perpetrator, but with a lesser crime, the punishment of the accomplice shall be based solely on the crime that he agreed to carry out. If the act was not consummated, the punishment of the accomplice shall be determined in accordance with the precepts of this article and those of the Title on tentative acts.

**Primary Complicity:** Interpreting the norms cited above, the doctrine gives the name of primary accomplice to the person providing the necessary cooperation described in article 45. In this sense and as clearly stated in the law, to be a primary accomplice one must provide cooperation completely necessary to the perpetrator or perpetrators, and as such it is indispensable not to be a perpetrator.

Article 45 of the Penal Code creates a rule of special punishment, taking notice of those cases of complicity in which the subject, despite making a necessary contribution, cannot be considered perpetrator because of restrictions of the principle of the control of the crime.

**Secondary Complicity:** Secondary complicity consists in aiding the perpetrator of a criminal offence. The aid is the help that the perpetrator accepts tacitly or in an express manner, meaning that the cooperation always requires a certain coordination between perpetrator and accomplice towards achieving the intended result. Also, to be considered secondary complicity, the cooperation must not be necessary for the commitment of the crime.

**Instigation:** Instigation is a form of making someone do something, in which the instigator does not have actual control of the action. Instigation is not defined in the Penal Code nor expressly mentioned in it. The concept is recognized in the specialized part (arts. 83; 99; 148 and 209).

## **Penal Code**

### **Chapter XIII - Hiding or laundering assets of criminal origin**

#### **Art. 277:**

- 1) In cases of a crime committed by another person, in which the subject did not participate, the following categories shall be punished with prison from six (6) months to three (3) years:
  - a) Those who aid someone to evade investigation by the authorities or to avoid being taken action against by the authorities.
  - b) Those who hide, alter or make disappear traces, evidence or instruments of the crime, or help the perpetrator or accomplice to hide them, alter them or make them disappear.
  - c) Those who acquire, receive or hide money, objects or effects coming from a crime.

- d) Those that don't report the perpetration of a crime or don't help identify the perpetrator or accomplice of a crime they know of, when under the obligation to promote the penal prosecution of a crime of that sort.
- e) Those that secure or help the perpetrator or accomplice to secure the product or benefit of the crime.

2) The scale of punishment shall have its minimum and maximum points doubled in the following cases:

- a) When the act in question constitutes an especially serious crime, those being crimes whose minimum punishment is superior to three (3) years in prison.
- b) When the perpetrator acts with intention of seeking profit.
- c) When the perpetrator habitually engages in hiding assets.

The aggravation of the penal scale provided for in this subsection shall only take effect once, even in cases where more than one of its qualifying circumstances are present. In this case, the tribunal may take into account the plurality of causes when determining the punishment.

3) Exempt from criminal responsibility are those who have acted in favour of their spouse, of a relative of no more than the fourth degree of consanguinity or the second degree of affinity or of an intimate friend or person to whom is owed special gratitude. The exemption is not valid with respect to the cases of subsections 1,e and 2,b.

#### **Art. 278**

1)

- a) A punishment of two to ten years of prison and a fine of two to ten times the amount of the operation shall be imposed on those who convert, transfer, administrate, sell, mortgage or in any other way use money or other kinds of assets coming from a crime in which they haven't participated, with the possible consequence that the original or subrogating assets acquire the appearance of having a licit origin, and with the condition that the value of the assets exceeds the sum of fifty thousand pesos (\$50.000), whether in one act or through the repetition of several, interrelated acts.
- b) The minimum of the penal scale shall be five (5) years of prison, when the perpetrator commits the act on a habitual basis or as member of an association or gang formed for the purpose of continued commitment of acts of this nature.
- c) If the value of the assets does not exceed the sum indicated in this subsection, letter a), the perpetrator shall be punished in accordance with the rules of article 277.

2) Those that because of temerity or serious imprudence commit any of the acts described in the previous subsection, first sentence, shall be punished with a fine of twenty percent (20%) to fifty percent (50%) of the value of the assets that are the object of the crime.

- 3) Those who receive money or other assets of criminal origin with the end of using them in an operation that may give them the possible appearance of having licit origin, shall be punished in accordance with the rules of article 277.
- 4) The objects to which the crimes of subsections 1, 2 and 3 of this article refer are subject to confiscation.

Our positive law does not harbour the concept of **conspiracy** as in Anglo-Saxon law. This category is criticized by certain parts of the national scholarly doctrine in that it is considered as a “punishment of the generic and abstract anticipation of cooperation”.<sup>8</sup>

In another order of ideas, it is important to note that participation always ends up as accessory to a fraudulent offence committed by another. In this sense it is impossible to conceive of a type of participation that is not accessory to a categorically anti-juridical (illicit) conduct.

As indicated, objective typification of participation requires that the principal fraudulent act should be typically anti-juridical. The typification of the participation begins with the principal act, that is, when the perpetrator of the principal act begins its execution. In this way, although the attempt at participation is atypical, the participation in the attempt is typical.

The legal provisions for complicity (*participación criminal*) explained in this Question Six, may also apply to special crimes described in Question Four. Hence, generally, a legal person –which as we saw can be liable for those special crimes— can also be held liable for any form of complicity.

If a person wants to commit a crime, but this person doesn't take any action which can be considered a “beginning of the commission” (*principio de ejecución*) of that crime, then that person can not be prosecuted. A distinction should be made between “beginning of the commission” of a crime and “preparatory acts” (*actos preparatorios*). The former is part of the crime even if the actions taken stop before the conclusion of the crime; the later is not. In order to decide if a given act is the “beginning of the commission” of a crime, or a merely “preparatory act” the Court must determine the actual risk of the interest (*bien jurídico*) protected by the criminal law (life, property, sexual integrity, etc.). After all, It is not a matter of “participation” (article 45 of the Penal Code), but a problem of “intent of” committing a crime (*tentativa*, article 42 of the Penal Code).

It was be said in this Question that in Argentine law there is no such a thing as conspiracy. However, there is a specific crime established in article 210 of the Penal Code which punishes “unlawful association for criminal purposes” defined by Courts as participation in association or group of three or more persons existing for criminal purposes. This crime may have some similarities with conspiracy, but the main difference

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<sup>8</sup> See.Zaffaroni, Eugenio R, *Derecho Penal, Parte General*, p. 758.

is that it requires the existence of other crimes planned by the association, even though the mere membership of the association is enough to warrant criminal prosecution.

**7. Are there any other practical considerations or factors that must be present when the defendant in a criminal proceeding is a business entity rather than a natural person?**

Question Seven refers to criminal proceedings. According to answers of Questions Four and Five, legal persons are not subject generally to criminal liability. Therefore, the pending criminal proceeding is not against Ford as a legal person, but against Ford servants (who acted during the 1970's). As a practical consideration, one can say that even though the Company is not a legal part of the proceeding, the Prosecutor has granted to their lawyers free access to the files.

There is a concurrent action against Ford Motor Argentina and Ford Motor Company in a tort legal action. As a practical and legal consideration, one of the defenses of the Argentine Company is denying the principle of "company continuation", arguing that the current Ford Motor Argentina is not the same Ford Motor Argentina which existed in 1976. The US Company has not presented defenses yet

**III. Status of International Law/International Humanitarian Law in your Country's Legal Framework**

**8. Which international crimes have been incorporated into your domestic criminal law? Please include any crimes enumerated in the Rome Statute of the International Criminal Court such as genocide, war crimes, crimes against humanity, and other relevant instruments.**

Our National Constitution, as reformed in 1994, has incorporated international treaties of human rights, and as such has adopted the hierarchy of the crimes they contemplate. Article 75 establishes that:

"It corresponds to Congress to (...) 22. Approve or reject treaties signed with other nations and with international organizations and the concordats of the Holy See. The treaties and concordats are of superior hierarchy to the laws. The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Optional Protocol; the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child; under the conditions of their validity have constitutional rank in the national legislation, they do not

derogate any article of the first part of this Constitution and are to be understood as complementary to the rights and guarantees recognized by them. They may only be denounced, as it were, by the National Executive Power, by approbation of two thirds of the totality of members of each Chamber. All other treaties and conventions on human rights, upon approval in Congress, require the vote of two thirds of the totality of members of each Chamber to assume constitutional rank.”

The Rome Statute does not enjoy constitutional rank, but has been ratified by Argentina and forms part of the internal legal order.

The constitutional order of the country is guided by the old monist doctrine, that is, it sustains that treaties are “self-executing”.

However, despite the fact that international instruments establishing crimes against humanity have been incorporated into our internal legal order, the criminal jurisdiction in the country applies the penal concepts contained in the Penal Code, with analogy to crimes against humanity. For example, in cases of forced disappearance of persons, the legal category applied is the crime of “illegal deprivation of liberty” as provided in the Penal Code.

Nevertheless, criminal jurisdiction does apply internally certain general principles emanating from crimes against humanity, as in the case of the imprescriptible nature of rights or the prohibition of blanket amnesties. Recently the Supreme Court of Justice declared unconstitutional two laws of this kind, invoking, among other foundations, several international instruments.

With regard to punishments or sanctions, the criminal jurisdiction applies the ones provided by the internal legal order, that is, by the Penal Code.

The question of how international crimes are in practice incorporated into domestic Argentine law is very complex because Courts are still developing case law on the subject.

International Instruments ratified by Argentina are self-executing, meaning that a law passed by the Congress is not required to incorporate them into domestic law. Therefore, criminal Courts –and all Courts as well–, shall take those instruments into account –and respect them– when deciding a case.

However, criminal Courts would apply the crimes and the penalties established in the Penal Code, and would not apply directly an international crime described in an international instrument (which are not incorporated into the Penal Code so far).

In a torture case, Courts have applied the torture crime and the penalties established in article 144 of the Penal Code. In a forced disappearance case, Courts have applied the crime of arbitrary detention and the penalties established in article 142 –

among others-- of the Penal Code. In massive assassination cases, Courts have applied homicide established in article 79 of the Penal Code.

But although criminal Courts have not applied directly international crimes, in practice they have incorporated principles of international criminal law, which produced drastic changes in our criminal law.

For example, the international principle which establishes that crimes against humanity are not subject to statute of limitations was applied in various human rights cases by the Supreme Court and other Courts. This precedent now allows Prosecutors to promote criminal actions for crimes contemplated in the Penal Code which can be assimilated to international crimes, otherwise impossible if applying national statute of limitations.

**9. Do your country's laws modify the provisions of the ICC Statute, such as concepts of aiding and abetting and conspiracy or liability of business entities rather than only natural persons?**

No.

**10. Do your criminal courts have jurisdiction over those international crimes that have not been incorporated into your domestic law?**

The National Constitution recognizes in article 118 the existence of a "law of peoples", and incorporates it to a certain extent in the internal order. Based on the interpretation of this article, and with special allusion to the principle of "ius cogens" recognized in article 64 of the Vienna Convention on the Law of Treaties (instrument ratified by the country), the Supreme Court of Justice incorporates all public international law into the internal order. The more support that may be found in international instruments, the stronger the legal force of international law in the internal order.

To say that a crime has been "incorporated into the internal order" means that the international instrument which contemplates that crime has been ratified by the country or incorporated in the National Constitution by special procedure. However, as explained in Question Eight, that international crime would not be directly applied by a Criminal Court (unless the Congress passes a law incorporating it into the Penal Code).

But besides that form of incorporating international crimes into internal order, i.e. ratification or incorporation in Constitution, there is a special provision in the Constitution, article 118, which, in general, recognizes *ius gentius* (*derecho de gentes*). In numerous cases, the Supreme Court has interpreted this article stating that through this constitutional provision all international law, generally, is part of our internal legal system.

Again, the question of how local Courts would apply international law in a given case still remains, although some answers are being delivered by Courts (significantly in criminal jurisdiction, as explained in Question Eight, and also in cases concerning discrimination and children rights).

**11. May a business entity be prosecuted for international crimes in the courts of your country, whether under domestic law or with reference to international law? If yes, under what circumstances?**

To answer this question, I refer to the explanations presented in the previous points, keeping in mind the state of our legal system as regards both the possibility of prosecuting legal persons, as well as the adopted criterion with relation to international law.

**IV. Alternative Mechanisms**

**12. Can you think of any bases in your country's tort law (civil law) for suing individuals and /or business entities for violations of international criminal law, IHL, (whether or not incorporated into domestic law)?**

The Argentine Civil Code is the law that allows suing physical or legal persons for damages and harm caused by acts that violate international human rights law or international criminal law.

In any case, the civil jurisdiction applies the Civil Code and the internal procedural laws, and the origin of the damage, whether or not it consists in acts that violate international law, is immaterial.

There is no law similar to the Alien Tort Claims Act in the Argentine legal system.

Civil remedies for violations of human rights are, basically, tort claims. In order to file a suit for torts, one must argue violations of civil law. Argentine civil law is very specific, and has no references to human rights or international law (although international law is incorporated into domestic law, as explained in Question Ten). That is to say that the Court would sustain a law suit if she finds violations of civil law.

A crime recognized in the Penal Code, which at the same time may be categorized as an international crime, means, generally, a violation of civil law. Hence, a tort claim may be based on a crime (or international crime) but legally speaking, to be successful, it must violate civil law, irrespective of whether the harm is caused by an action that violates the Penal Code or international humanitarian law.

A tort claim allows recovering damages caused by the conduct which violates civil law. Damages vary according to the case, but generally the items are:

1. Physical injuries (it has to be demonstrated)
2. Psychological injuries (it has to be demonstrated)
3. Lost income (“lucro cesante”, income which couldn’t be earned because of the injuries; it has to be demonstrated)
4. Professional, suing and other costs (it has to be demonstrated)
5. Moral damage (there is a standardization and, generally, needs no demonstration)

A very important difference with American tort law is that Argentine civil law does not provide for PUNITIVE DAMAGES. This vacuum implies a serious obstacle to prevent violations of human rights committed by legal persons, because only punitive damages represent a true cost to business entities.

## **V. Jurisdiction and related issues**

### **13. On what bases do the courts of your country assert personal jurisdiction over criminal and civil defendants?**

#### **PENAL JURISDICTION**

The Argentine Penal Code regulates the matter in its article 1.

#### **FIRST BOOK**

#### **GENERAL PRINCIPLES**

#### **Title I**

#### **Application of the penal law**

**Art. 1** – This code shall be applied:

- 1) For crimes committed within or whose effects are noticed in the territory of the Nation of Argentina, or in the places under its jurisdiction.
- 2) For crimes committed abroad by agents or servants of Argentine authorities, in the function of their duties.

What can be gathered from the text is that it contains few limitations to the principle of territoriality. Existing scholarly doctrine holds that this norm establishes the so-called rule of ubiquity, according to which the location of the action matters as much as the location of the effects. A reasonable dogmatic reconstruction of article 1 of the Penal Code permits us to conclude that a) Argentine law is primarily applicable to actions taking place within national territory, and b) in case of negative conflict it also applies if the result of the action has effects within the territory.

Anyway, whether it is considered that Argentine law, together with the mentioned rule of ubiquity, adopts or not the principle of defence as subsidiary to the principle of territoriality, depends on the scope that is afforded to the word “effects” of article 1 of the

Penal Code. In this sense it must be understood that it covers actions and typical results produced abroad if they affect the legally guaranteed assets of entities within the territory.

On the other hand, and of lot less impact than the principle of defence, there is the principle of personality or nationality. The law (in force) 24.767 establishes in its article 12 that a national citizen being prosecuted abroad has the option to choose to be judged by national tribunals, in which case Argentine law shall be applicable, in the event that the prosecuting state agrees.

A Court exercises jurisdiction when a crime is committed in the territory of the country or the effects of the crime take place in the country (article 1 Penal Code). As a general rule, a Court doesn't assert jurisdiction when the crime is committed outside the territory, even though the victim is a national of the country.

The international principle of "universal jurisdiction" has no application in the Courts, although it was given some secondary consideration in various human rights cases.

According to Argentine criminal procedure, if the accused doesn't appear before the Court, either voluntary or summoned (i.e. arrested), the proceeding has to be suspended until the appearance.

### **CIVIL JURISDICTION**

The competence in civil matters (jurisdiction) is determined by the domicile of the defendant or the place of the action, at the plaintiff's choice (article 5.4 of the Procedural Civil and Commercial Code of the Nation). That is, the plaintiff suing for damages may opt for the jurisdiction corresponding to the place of residence of the defendant, independently of where the action occurred.

This means that it is possible to sue someone domiciled in Argentina (whether it be a physical or legal person), although the facts that caused the damage occurred outside the country. However, there is very little jurisprudence on this type of cases, and it is probable that the difficulties of gathering evidence and reconstructing the facts will inhibit the court procedure, despite the principle of "forum non conveniens" not being applied in Argentina.

There is no such a distinction between subject matter and personal jurisdiction as it is in common law. There is a criminal law system, a civil law system, a commercial law system, a labor law system, and so forth. Courts from each of these systems exercise jurisdiction in their respective subjects, according to some personal and territoriality jurisdictional basis.

A given district Court asserts jurisdiction (a) if the defendant has domicile within the district of the Court, or (b) if the harm was caused within the district of the Court. The plaintiff has the right to select options (a) or (b).

Under these basis, a human rights victim can file a lawsuit (arguing violation of civil law, see Question Twelve) against a foreign company with no domicile or business activity in the territory, if the harm was caused within the district of the Court (option (b)).

On the other hand, a human rights victim—even a foreign one--can file a lawsuit (arguing violation of civil law, see Question Twelve) against a national or foreign company who has domicile in the country (option a), even if the harm occurred outside the territory.

No precedents exist in any of these two alternatives, and of course many questions would arise. On the first hypothesis, some problems would be: how to serve the compliant; how to enforce a judgment (among others like disclosure). Eventually, diplomatic channels would be necessary. On the second hypothesis, the most important difficult would be to gather evidence situated in another country. An additional problem would appear if one wants to sue a local business entity for the acts committed by a subsidiary in a foreign country, because argentine law makes very difficult to hold the parent responsible for the acts of the subsidiary (see Question Fifteen).

One example would be the Ford civil proceedings. The plaintiffs are suing Ford Motor Company, U.S. multinational. Ford has domicile in Argentina, a legal domicile where we already served the compliant. But Ford has no other presence in the country, i.e. business or economic activity. Therefore, enforcement of judgment (and other items like disclosure) may show serious difficulties.

According to Argentine civil procedure, if a defendant does not appear before the Court when summoned, the proceedings may go forward and end with a ruling.

**14. When parent and subsidiary entities are involved in a multinational setting, how does a court assert personal jurisdiction over parents or subsidiaries located out of country? What are the standards for overcoming limitations on jurisdictions over business entities within a multinational corporation?**

As was explained in the previous answer, civil jurisdiction permits suing a legal or physical person domiciled abroad, for acts committed within the country.

With regard to penal jurisdiction, the governing principle is that of territoriality, then where the results or effects take place, and finally, and only in exceptional cases, penal jurisdiction may be decided by nationality of the defendant.

The possibilities in the country of successfully suing the parent entity for damages committed by the subsidiary are in truth small. Certain norms of public order have been established and the very multinationals have devised other legal forms, all working towards the end of impeding the linkage of the subsidiary with the parent entity.

As explained in Question Thirteen, civil law jurisdiction allows suing a legal person with no domicile or any connection to the territory, on the condition that the harm has occurred within the territory of the country. Therefore, assertion of jurisdiction doesn't need any of the forms enumerated in this question, but the local harm. The problem would be, as pointed before, practical applicability of jurisdiction where defendants have residence or do business overseas. However, once the defendant is summoned, the proceedings will go forward even if he afterwards does not appear before the court.

**15. How may a court attribute the actions of a subsidiary to a parent business entity, i.e. "pierce the corporate veil"?**

Article 54 of the Law of Commercial Societies allows the "piercing of the corporate veil". In this manner it is possible to "penetrate" and find the real essence of the personal or corporate assets of the legal person, and reveal the illicit ends or acts hidden behind the mask of legal personality. This regulation could eventually allow linking the parent entity to the subsidiary that is responsible for the damages, to the effect that a civil case could be made against both. However, the jurisprudence holds that this regulation should be applied in a restrictive manner.

"Piercing the corporate veil", which is allowed by Argentine law, does not answer the question of how to attribute the actions of a subsidiary to a parent business entity. This is a very important question and looking inside the company (hidden components) does not mean that a Court will find legal basis to hold the parent responsible for acts of the subsidiary.

As explained in Question Thirteen, there are numerous legal provisions that make the subsidiary "independent" from the principal, which makes rather difficult to attribute responsibility to the latter. Having the ownership of the subsidiary (or at least most of the shares) does not imply attribution of responsibility for acts committed by the subsidiary. Courts must apply legal theories in order to reach such a conclusion.

**16. What types of actions (civil and criminal) might be asserted against a business entity with respect to activities taking place outside of your jurisdiction by a business entity over which your courts have jurisdiction?**

As explained in Question Thirteen, general civil law permits to assert jurisdiction in tort claims, on the condition that the defendant has domicile in the country, even if the harm has occurred outside the territory. Statutes mentioned in Question Four do not provide specifically for criminal jurisdiction over acts committed in other countries, but civil law for tort claims would otherwise apply.

As explained before, a criminal Court asserts jurisdiction if a crime or its effects take place in the territory of the country, irrespective of where the individual is situated.

If the individual is in the country, he would be summoned. If the individual is abroad, the Court would require extradition if treaties allow it. In any case, if the individual does not appear before the Court, the criminal proceeding is suspended until appearance.

Under this jurisdictional basis, the examples given in the comments would permit a Court to assert criminal jurisdiction if it is possible to prove that effects of the crime has occurred in the country. As a general rule, the principle of nationality (the example of the Argentine citizens murdered abroad) is not applicable.

**17. If plaintiffs wanted to sue a business entity in your jurisdiction, what are some of the jurisdictional and procedural obstacles that they (and their lawyers) might face?**

The monetary obstacles are filing fees and attorney fees.

The procedural obstacles that the company could use, among others, are:

- (i) Oppose the prescription of the civil action, which at the moment, for cases based on crimes against humanity, is of two years.
- (ii) Argue lack of responsibility of the legal person, and delegate the responsibility to dependents.
- (iii) Argue lack of relation between parent company and the subsidiary responsible for the damages.
- (iv) Argue that the case has already been settled in cases where public servants have been sentenced for crimes against humanity.
- (v) Insufficient evidence (in cases of crimes committed in the past, the passing of time works against the gathering of direct evidence).

As explained in previous questions, the general rule is that business entities can not be prosecuted criminally for violations of the Penal Code.

However, business entities can be sued for torts, i.e. violations to civil law, which in criminal jurisdiction may be considered a crime regulated in the Penal Code, and under international law may be also considered an international crime.

Under civil law, as explained in Question Five, acts of servants are directly attributed to the business entity, so you can directly sue the legal person for acts committed by servants.

As to the additional obstacles mentioned in the comments, we can say:

1. Only the victim who was injured has the authority to file a law suit for torts.
2. If the victim dies after the suit was filed, close relatives (herederos) of the victim have the right to follow the suit.
3. There is no class action for tort claims.
4. As a general rule, the government does not appear before a law suit for torts, even if the act that caused the harm is considered a crime at the criminal jurisdiction. A civil law suit is a matter of private parties. However, the institute of amicus curiae has had some interesting developing in criminal proceedings, which may lead in the future to participation of the government and NGOs in civil proceedings.
5. If the tort claim against a business entity is based on acts which at the same time are considered human rights violations or crimes against humanity, the defendant would most probably argue that those acts have to be considered “acts of State”, since the premise is that only States can be responsible for human rights violations.

**18. Do the civil courts of your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of forum non conveniens)?**

Our tribunals have not adopted the doctrines of “forum conveniens” and “forum non conveniens”, prevailing in Anglo-Saxon law especially with regard to civil and commercial matters.

From an exclusive legal point of view, the answer to the question is affirmative. As stated in Question Thirteen, under civil law jurisdiction a foreign plaintiff can file a suit against a foreign defendant with domicile in Argentina even though a matter has occurred in a foreign country.

However, this answer is merely legal and hypothetical because no cases like these have been brought to Courts so far. Hence, no doctrines such as forum non conveniens were developed, and questions about evidence existing in a foreign country were not addressed.

Under criminal jurisdiction, Courts do not have jurisdiction over crimes committed in a foreign country. However, if a criminal who commits a crime in a foreign country flees to Argentina, a criminal Court could intervene in the extradition process, if required by the foreign country.

**19. Are there any checks and balances on prosecutorial discretion or decision making (e.g. when a prosecutor declines to prosecute a case, are there any measures in place to review his or her decision or an appeals mechanism?)**

Among the reforms introduced to the National Constitution in 1994 is the establishment in article 120 of the independence of the Public Ministry. This organ enjoys functional autonomy and financial self-sufficiency in order to promote, in the justice sector, the defence of legality and the general interests of society in coordination with the other authorities of the republic.

The Public Ministry Prosecutor holds monopoly over penal action, in the understanding that bringing charges is a substantial figure of any penal process. However the tribunals have the legal authority to exercise prudent control of the legality and reasonableness of the performance of the prosecutor, and where so merits to declare the nullity of his actions within the bounds of the penal process.

In any case, the victim has the right to participate fully in the penal process, providing evidence, arguing their significance and appealing adverse sentences. As such the victim assumes the role of plaintiff in the process, a kind of private prosecuting counsel.

The right of the individual-victim to participate in criminal proceedings has existed for many years. This right gives to the individual the status of “party” of the proceeding as a “private accuser”. The other “parties” are the Prosecutor and the accused and his lawyer.

The law recognizes to this individual party the following faculties, among others: to present evidence, to issue legal opinions, to argue for the denial of bail, to ask for the indictment of the accused, to cross examine witnesses, to appellate rulings, to participate in trial.

This right is not only recognized to the victim, but also to any organization dedicated to prevent violations of human rights. Some human rights NGOs have been included as a “party” in important human rights cases.

A criminal action can be initiated by the victim before the Prosecutor (or before the police or even before a criminal judge), and at the same time the victim has the right to be included into the proceeding as a “private accuser”, with the faculties mentioned above.