

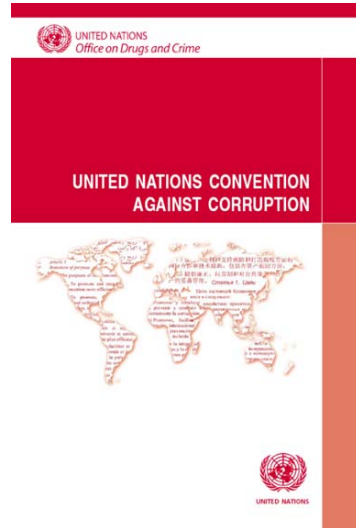
# The Supreme Court Guidance on Corporate Criminal Liability – some observations

"Ingin hati memeluk gunung, apa daya tangan tak sampai."

The will of the heart is to hug the mountain, but the arm is not long enough.

*Chapter II  
Preventive  
measures*

*Chapter III  
Criminalization &  
Law Enforcement*



*Chapter V  
Asset Recovery*

*Chapter IV  
International  
Cooperation*



# The problem: Enlisting the Private Sector

Historically, there has been insufficient compliance within business enterprises to legal requirements imposed by criminal law because of low levels of

Investigation

Prosecution

Conviction

Punishments

commitment by corporations ...

... so it is cheaper to take the risk.

The focus of recent activity in many jurisdictions has been upon shifting the costs of compliance onto the private sector.

# Constitutional Status?

# Definition of corporation

Article 1.1 'corporation' = 'an organised group of people and/or assets, both as a legal entity and not a legal entity'.

Criminal vs non-criminal organisations?

Criminal organisation? Terrorist organisation?  
Conspiracy? Yukos?

Article 10? (data optional? How known?)

Article 8 'Criminal act conducted by a corporation is a criminal act that can be criminally charged to the corporation according to the applicable law regulating corporations.'

# What punishments?

Rendering corporation insolvent? (consequences for sector? Relevance of size? Should shareholders/managers/employees take the hit?)

Debarment from public procurement?

Running company for public weal?

Preventing the corporation from being wound up?

Fines short of making corporation insolvent?  
(fairness and efficacy issues?)



## Article 2.c

To spur effectiveness and optimise the criminal case handling in cases where corporations or corporate officials are perpetrators.

# Article 4

In preferring charges against a corporation, the judge shall assess its fault, due (amongst others) to:

- a. whether or not the corporation benefited or profited from the criminal act, or that the benefit or that it was performed for the benefit of the corporation;
- b. whether or not the corporation allowed the crime to take place;
- c. whether or not the corporation took necessary measures to prevent the events and ensure adherence to the law

# Parents and subsidiaries

Article 6 very important (NB FCPA/OECD Paris Convention lacuna).

# Continuity of (Legal) Personhood/Agency?

What if corporation changes:

- (i) its name;
- (ii) its CEO/CFO;
- (iii) its directors;
- (iv) its employees;
- (v) its shareholders?

What if it is taken over, or merges with another corporation?

Is it still the same entity? Articles 5-8.