

Section 17: Offenses against the Administration of Justice

General Commentary

Very often, the legislation of post-conflict states lacks adequate administration-of-justice offenses. This section is a relatively extensive collection of such offenses, inspired by various domestic penal codes around the world, including both newly drafted legislation of post-conflict states and legislation of non-post-conflict states. Inspiration has also been drawn from the list of administration-of-justice offenses prescribed under the Rome Statute of the International Criminal Court, the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, and the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda. For the efficient and effective administration of justice, it is imperative that the legislation of post-conflict states contain a comprehensive set of administration-of-justice offenses.

Article 189: Alteration or Destruction of Evidence

Article 189.1: Definition of Offense

A person commits the criminal offense of alteration or destruction of evidence when he or she alters or destroys evidence introduced, or likely to be introduced, in judicial proceedings.

Commentary

Judicial proceedings include not only trials of criminal offenses but also pretrial hearings before a judge. For the definition of evidence, reference should be made to Article 1(4) of the MCC.

Article 189.2: Penalty

1. The applicable penalty range for the criminal offense of alteration or destruction of evidence is one to five years' imprisonment.
2. The court may impose a fine, as an alternative principal penalty, upon a person convicted of alteration or destruction of evidence.

Article 190: Fabrication of Evidence

Article 190.1: Definition of Offense

A person commits the criminal offense of fabrication of evidence when he or she, with intent to mislead, fabricates anything intending it to be used as evidence in existing or proposed judicial proceedings.

Commentary

Judicial proceedings include not only trials of criminal offenses but also pretrial hearings before a judge. For the definition of evidence, reference should be made to Article 1(4) of the MCC.

Article 190.2: Penalty

1. The applicable penalty range for the criminal offense of fabrication of evidence is one to five years' imprisonment.
2. The court may impose a fine, as an alternative principal penalty, upon a person convicted of fabrication of evidence.

Article 191: Presentation of False or Forged Evidence

Article 191.1: Definition of Offense

A person commits the criminal offense of presentation of false or forged evidence when he or she presents evidence in judicial proceedings knowing it to be false or forged.

Commentary

Judicial proceedings include not only trials of criminal offenses but also pretrial hearings before a judge. For the definition of evidence, reference should be made to Article 1(4) of the MCC.

Article 191.2: Penalty

1. The applicable penalty range for the criminal offense of presentation of false or forged evidence is one to five years' imprisonment.
2. The court may impose a fine, as an alternative principal penalty, upon a person convicted of presentation of false or forged evidence.

Article 192: False Testimony

Article 192.1: Definition of Offense

A person commits the criminal offense of false testimony when he or she gives false testimony in judicial proceedings, where he or she is under an obligation to tell the truth.

Commentary

Judicial proceedings include not only trials of criminal offenses but also pretrial hearings before a judge. They also include noncriminal proceedings, such as administrative proceedings.

An accused person who is on trial is not liable for the offense of false testimony where he or she gives testimony without an oath. Reference should be made to Chapter 11, Part 2 on “Statement of the Accused,” of the MCCP.

Article 192.2: Penalty

1. The applicable penalty range for the criminal offense of false testimony is one to five years’ imprisonment.
2. The court may impose a fine, as an alternative principal penalty, upon a person convicted of false testimony.

Article 193: Obstruction of Justice of a Witness

Article 193.1: Definition of Offense

A person commits the criminal offense of obstruction of justice of a witness when he or she:

- (a) uses physical force, threats or intimidation, or promises, offers or gives an undue advantage;
- (b) to induce false testimony or to interfere in the giving of testimony or the production of evidence in judicial proceedings.

Commentary

Obstructing a witness in giving testimony or providing evidence before a court is a threat to the integrity of the criminal justice system and also greatly compromises the prosecution of perpetrators. In addition, this offense represents a grave threat to the safety and security of witnesses in judicial proceedings. The obstruction of witnesses has become a common phenomenon in serious crimes cases, such as those involving

organized crime and corruption. In post-conflict states, where organized crime and corruption are often endemic, obstruction of witnesses has been an obstacle to the prosecution of these offenses. Its perpetration has resulted in the evasion of justice and thus the facilitation of organized crime and corruption. Consequently, Article 23 of the United Nations Convention against Transnational Organized Crime and Article 25 of the United Nations Convention against Corruption require states parties to introduce this offense into domestic criminal legislation, if they have not already done so. The wording of Article 193 has been taken from those conventions, which share identical wording. Reference should be made to the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, drafted by the United Nations Office on Drugs and Crime.

Article 193.1(a) covers both coercive and corrupt means of influencing a witness in an effort to induce false testimony or to interfere in the giving of testimony or the production of evidence. The legislative guide states that the phrase *judicial proceedings* “should be interpreted broadly” (page 92) and should include pretrial processes.

The criminalization of obstruction of witnesses is not the only means by which the Model Codes seek to protect witnesses in judicial proceedings, who may be in physical danger from the perpetrator of a criminal offense or from persons connected with him or her. Reference should be made to Chapter 8, Part 4, Sections 1 and 2, of the MCCP on witness protection measures and witness anonymity. Witness protection and witness anonymity measures are a more proactive approach to ensuring the safety of witnesses in judicial proceedings. These provisions seek to preempt the commission of criminal offenses against witnesses, specifically obstruction through the use of physical force, threat, or intimidation. Under the provisions of the MCCP, a witness who is under threat may be granted protective measures or witness anonymity, thereby protecting the person from any potential coercive conduct aimed at obstructing him or her.

Article 193.2: Penalty

1. The applicable penalty range for the criminal offense of obstruction of justice of a witness is one to five years' imprisonment.
2. The court may impose a fine, as an alternative principal penalty, upon a person convicted of obstruction of justice of a witness.

Article 194: Obstruction of Justice of a Justice or Policing Official

Article 194.1: Definition of Offense

A person commits the criminal offense of obstruction of justice of a justice or policing official when he or she uses physical force, threats, or intimidation to interfere with the exercise of official duties by a justice or policing official.

Commentary

Both the United Nations Convention against Transnational Organized Crime (Article 23) and the United Nations Convention against Corruption (Article 25) urge states parties to introduce the offense contained in Article 194 into domestic criminal legislation, if they have not already done so. Reference should be made to the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, drafted by the United Nations Office on Drugs and Crime.

Article 193 (“Obstruction of Justice of a Witness”) penalizes obstruction through coercion and corruption. A definition of the latter is not contained in Article 194; it is covered by Article 138 (“Corruption Involving a Public Official”), because justice and policing officials are considered public officials within the meaning of Article 1(9).

Article 194.2: Penalty

1. The applicable penalty range for the criminal offense of obstruction of justice of a justice or policing official is one to five years’ imprisonment.
2. The court may impose a fine, as an alternative principal penalty, upon a person convicted of obstruction of justice of a justice or policing official.

Article 195: Retaliation against a Witness

Article 195.1: Definition of Offense

A person commits the criminal offense of retaliation against a witness when he or she retaliates against a witness for giving evidence in the investigation of a criminal offense or for testifying in judicial proceedings.

Article 195.2: Penalty

The applicable penalty range for the criminal offense of retaliation against a witness is two to ten years' imprisonment.

Article 196: Retaliation against a Justice or Policing Official

Article 196.1: Definition of Offense

A person commits the criminal offense of retaliation against a justice or policing official when he or she retaliates against an official of the court or a policing official on account of duties performed by that or another official.

Article 196.2: Penalty

The applicable penalty range for the criminal offense of retaliation against a justice or policing official is two to ten years' imprisonment.

Article 197: Failure to Respect an Order of the Court

Article 197.1: Definition of Offense

A person commits the criminal offense of failure to respect an order of the court when he or she, in the course of judicial proceedings:

- (a) fails to respect an order of the court; or
- (b) fails to comply with a commitment made to the court.

Commentary

Judicial proceedings include not only trials of criminal offenses but also pretrial hearings before a judge. An order of the court may be given orally in court proceedings, or it may be pursuant to a summons to a witness, an expert witness, or the accused to appear in court. It may also take the form of an order that has been granted pursuant to a motion of the prosecutor or the defense or a warrant that has been granted pursuant to an application of the police or the prosecutor. Where any of these orders is not respected by a person, he or she is liable for prosecution under Article 197.

Article 197.2: Penalty

1. The applicable penalty range for the criminal offense of failure to respect an order of the court is one to five years' imprisonment.
2. The court may impose a fine, as an alternative principal penalty, upon a person convicted of failure to respect an order of the court.

Article 198: Providing Assistance to a Perpetrator after the Commission of a Criminal Offense

Article 198.1: Definition of Offense

A person commits the criminal offense of providing assistance to a perpetrator after the commission of a criminal offense when he or she:

- (a) harbors a suspect or an accused person for the purpose of evading justice;
- (b) helps the perpetrator of a criminal offense elude discovery by concealing instruments or evidence or aids the perpetrator in any other way;
- (c) harbors a convicted person; or
- (d) takes steps toward frustrating the execution of a penalty imposed by a court.

Commentary

This criminal offense is referred to as accessory after the fact liability in some jurisdictions. In other jurisdictions, it is viewed as a form of accomplice liability rather than a stand-alone substantive offense. In the MCC, it is treated as a stand-alone criminal offense. For the definition of suspect, accused person, and convicted person, reference should be made to Article 1.

Article 198.2: Penalty

1. The applicable penalty range for the criminal offense of providing assistance to a perpetrator after the commission of a criminal offense is one to five years' imprisonment.
2. The court may impose a fine, as an alternative principal penalty, upon a person convicted of providing assistance to a perpetrator after the commission of a criminal offense.

Article 199: False Statements of a Cooperative Witness

Article 199.1: Definition of Offense

A person commits the criminal offense of false statements of a cooperative witness when he or she:

- (a) having been declared a cooperative witness under the MCCP;
- (b) gives testimony that is false, in any relevant part, or purposely omits to state the complete truth to the prosecutor, the police, or the court during the investigation of the offense or in judicial proceedings.

Commentary

A cooperative witness is a person suspected or accused of a criminal offense who is granted immunity from prosecution through a formal legal process by reason of his or her agreement to testify against another accused person in another trial. The MCCP contains extensive provisions that set out the formal legal process for the granting and revocation of cooperative witness status. Reference should be made to Chapter 8, Part 4, Section 3, of the MCCP and the accompanying commentary, which discuss the legal provisions on cooperative witnesses in greater depth.

Where a person who has been declared a cooperative witness is found to have made a false statement, either prior to or during the trial at which the cooperative witness is giving testimony, he or she may be prosecuted under Article 199. This provision is broader than Article 192 on false testimony in two ways. It covers the investigation prior to trial and not just statements delivered under oath before the court. A cooperative witness who makes a false statement to a prosecutor or the police during pretrial investigations can thus be prosecuted under Article 199. Under the MCC, it is not possible to prosecute other persons for false statements made to a prosecutor or the police in the investigation stage of proceedings.

Article 199.2: Penalty

1. The applicable penalty range for the criminal offense of false statements of a cooperative witness is one to five years' imprisonment.
2. The court may impose a fine, as an alternative principal penalty, upon a person convicted of false statements of a cooperative witness.

Article 200: Revealing the Sealed Order for Protective Measures or Anonymity

Article 200.1: Definition of Offense

A person commits the criminal offense of revealing the sealed order for protective measures or anonymity when he or she reveals the sealed order for protective measures granted under the MCCP or the sealed order for anonymity granted under the MCCP, including the petition, any documents, or any information contained in them.

Commentary

The MCCP contains extensive provisions on witness protection measures and the granting of witness anonymity. Reference should be made to Chapter 8, Part 3, Section 4, of the MCCP and the accompanying commentary, which discuss witness protection measures and witness anonymity in greater detail. In brief, witness protection measures and witness-anonymity measures aim to protect witnesses whose personal security may be under threat because they have agreed to testify at a trial. Witness protection measures aim to protect the identity of a witness from the public and the press and include things such as expunging the name of the witness from the public record and closing court sessions to the public. Witness-anonymity measures aim to protect the identity of a witness from the public, the press, and the accused person.

It is of vital importance that once an order for witness protection measures or anonymity is granted, the name of the witness in question and any details about the witness are not revealed by those persons who are privy to documentation pertaining to the witness protection order or the order for witness anonymity. These persons may include, for example, court staff, staff of the office of the prosecutor, or defense lawyers (where witness protection measures or orders for witness anonymity have been granted in favor of the defense). Thus, the criminal offense of revealing the sealed order for witness protection or witness anonymity was included in the MCC. Not only is revealing the final order for witness protection or anonymity criminalized, but so is revealing the petition for either order made by the prosecution or the defense, any other documents or information contained in the petition, the order, or other documents.

Article 200.2: Penalty

1. The applicable penalty range for the criminal offense of revealing the sealed order for protective measures or anonymity is one to five years' imprisonment.
2. The court may impose a fine, as an alternative principal penalty, upon a person revealing the sealed order for protective measures or anonymity.