

Section 2: Fundamental Principles

Article 2: Purpose and Limits of Criminal Legislation

1. Criminal offenses and penalties must be prescribed only for acts threatening or violating human rights and fundamental freedoms, as well as other rights and social values guaranteed and protected by the constitution of [insert name of state] or international law.
2. Criminal offenses and penalties must be prescribed only where the protection of human rights and fundamental freedoms, as well as other rights and social values guaranteed and protected by the constitution of [insert name of state] or international law, could not be realized without criminal justice compulsion.
3. Criminal offenses, as well as the types and the range of penalties attached to them, must be based upon:
 - (a) the necessity for criminal justice compulsion; and
 - (b) its proportionality with the degree and nature of the danger against human rights and fundamental freedoms, as well as other rights and social values guaranteed and protected by the constitution of [insert name of state] or international law.

Commentary

In a post-conflict setting, the general public's view of what the criminal law represents is often shaped by unhappy past experiences, such as the law being used to oppress or discriminate against the local population or to violate the fundamental rights and

freedoms of individuals or certain groups. The drafters thus considered it appropriate to commence the MCC with a general affirmative statement of what the purpose of criminal legislation is to be. This statement is a common feature of many criminal codes around the world, and its inclusion is meant to signal a paradigm shift and an affirmative statement of the manner in which the criminal law is to operate in the future. Criminal law should no longer be able to be created at the whim of a government, president, or legislature. It should serve a different and legally defined purpose. The future promulgation of laws by the competent legislative body must be done within the parameters of this article.

The rationale behind the criminal law is a complex philosophical question that has been debated for centuries and is far beyond the scope of the present discussion. Article 2 highlights a number of fundamental aspects of the criminal law that are particularly important to emphasize in the context of a state emerging from conflict or in states that have been ruled by oppressive regimes. First, the criminal law's rationale is to provide a framework to uphold the rights and maintain the security of society at large through the criminalization and penalization of behavior that violates human rights and fundamental freedoms—rights and values that are constitutionally guaranteed and rights that derive from international law.

Second, criminal offenses and penalties must not be prescribed where these rights and values can be realized and protected through other means. The principle of proportionality underlies this provision, meaning that use of the criminal justice system is a measure of last resort and must be based upon necessity. This idea is sometimes known as the principle of minimum criminalization. The requirement that the range of penalties be provided for by law is taken up later in the MCC. Reference should be made to Section 12 of the General Part of the MCC and its accompanying commentary.

Another point of note is that inherent in Article 2 is the notion that criminal law is reflective of the particular society it governs and its mores or social values. Thus the criminal law of each state, while it may be markedly similar to the law of other states, will also have elements that are unique to its particular context.

Article 3: Principle of Legality

1. Criminal offenses and penalties must be prescribed only by law.
2. No penalty may be imposed upon any person for committing a criminal offense that did not constitute a criminal offense prior to it being committed and for which a penalty was not prescribed by law.
3. Paragraphs 1 and 2 do not prejudice the trial and punishment of any person for any act or omission that, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

4. The definition of *criminal offense* must be strictly construed, and the use of analogy in the interpretation of a criminal offense is prohibited.
5. If the law was amended on one or more occasions after a criminal offense was perpetrated, the law that most favors the accused must be applied.
6. A penalty that is heavier than the one that was applicable at the time a criminal offense was committed may not be imposed upon a person convicted of that offense.

Commentary

The principle of legality is common to all legal systems and is based on the requirement of certainty of the law. Legal certainty is an inherent element of the general definition of the rule of law. While it is recognized by all legal systems, it is articulated in a different manner in different systems, depending on the legal traditions to which they adhere.

It is relevant to note that in applying the law, there cannot be a total absence of judicial discretion. The MCC, for example, sets down the applicable defenses available to a person who has committed a criminal offense, as required by the legality principle. Article 21, on necessity, sets out the interests that a person can protect by his or her act of necessity, including “other protected interests.” This phrase requires judicial interpretation to give it a legal meaning. The distinction between this discretion and the sort of discretion found in systems that have a generally flexible attitude toward judicial discretion, though, is that the discretion is limited and is defined by law, as opposed to being a broad, open, and general one.

Article 3 articulates four elements that constitute the principle of legality: (1) the law must not operate retroactively to prosecute and penalize a person for behavior that was not classed as a criminal offense at the time the behavior was undertaken or where no penalty was prescribed by law; (2) the law must be derived from a legislative act and must be written; (3) the law must be specific and clear; (4) the use of analogy is prohibited (this element includes the principle that where interpretations of the law conflict, they must be read in favor of the accused).

Paragraphs 1 and 2: These paragraphs are relatively self-explanatory and proclaim the general principle of legality that criminal offenses and penalties must be prescribed by law that is promulgated by the legislature. These principles are sometimes called *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no punishment without law). They are contained in the constitutions and criminal legislation of many states and are included in international instruments such as the Universal Declaration of Human Rights (Article 11), the International Covenant on Civil and Political Rights (Article 15), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 7), the African Charter of Human and Peoples’ Rights (Article 7), and the American Convention on Human Rights (Article 9). The principles contained in Paragraphs 1 and 2 provide a guarantee of protection from retroactive or ex post facto laws, meaning that if a certain course of conduct was not contrary to

domestic criminal law at the time it was undertaken, then a person who engaged in this conduct cannot subsequently be punished for it. The idea behind this right is that individuals should have adequate notice of what the law is, what their legal rights and obligations are, and what the consequences of their actions are. It also prevents arbitrary use of power by the legislature and is a core component of the rule of law principle.

Criminal offenses must exist either in the criminal code or in another written piece of legislation. This legislation must also set down specific penalties for each criminal offense. Some states declare only maximum penalties for criminal offenses, while other states declare both a minimum and a maximum penalty. Both approaches comply with the principle of legality set out in the MCC. In some states that adopt a more flexible approach to the principle of legality, penalties are often not set out in legislation. This approach was not followed in the MCC. The drafters of the MCC chose to follow a minimum-maximum penalty structure. Reference should be made to Article 38 and its accompanying commentary.

Implicit in the principles set out in Paragraphs 1 and 2 lies the principle of specificity, which holds that legislation on criminal offenses must be drafted clearly and in such a way that a person may ascertain the legality of a particular course of conduct. Legal provisions may not be overexpansive or imprecise. The International Covenant on Civil and Political Rights (Article 15) states that “no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense . . . at the time when it was committed.” The same wording is used in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 7), the African Charter on Human and Peoples’ Rights (Article 7), and the American Convention on Human Rights (Article 9). In interpreting this provision, the European Court of Human Rights held that implicit in this provision was the principle that the law must be clear and certain (*Baskaya and Okcuoglu v. Turkey*, paragraph 39). The court has also declared that a qualitative requirement of this provision is that the law should be accessible and foreseeable. This requirement has implications for a post-conflict environment, where new laws that are promulgated are often not published in local languages or distributed to those who are to apply the law, such as judges, lawyers, prosecutors, and police. During the course of the vetting process for the Model Codes, many experts recounted instances in which laws drafted in the post-conflict period were not even distributed to the judges who were to apply them. To comply with the present article and international standards, efforts should be made to publish the laws, in either an official journal or a collection, in print or electronically. Public notices or awareness campaigns may also be required to inform the local population of any changes in the law.

As regards the point discussed above about the degree of precision required for criminal offenses, while the law must be sufficiently clear and precise, an element of judicial interpretation will always remain. As stated by the European Court of Human Rights, “However clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points or for adaptation to changing circumstances” (*Baskaya and Okcuoglu v. Turkey*, paragraph 39). This need for judicial discretion in interpreting the law is discussed above, in the general commentary to Article 3.

Paragraph 3: There is one exception to the general principle of nonretroactivity set out in Paragraphs 1 and 2. It is contained in Article 15(2) of the International Covenant on Civil and Political Rights, which provides that “[n]othing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” Many commentators have interpreted this provision to mean that the criminal offenses of genocide, crimes against humanity, and war crimes may be prosecuted even if they were not spelled out in national law at the time of their commission because these acts have been recognized as criminal offenses in international criminal law for many years. The definition of *genocide* was recognized in international criminal law with adoption of the 1948 Genocide Convention. The definitions of crimes against humanity and war crimes used in the MCC are based on provisions in the Rome Statute of the International Criminal Court, adopted by general agreement in July 1998. But the definition derived from the Rome Statute of the International Criminal Court itself largely reflects customary international law and “the general principles of law recognized by the community of nations.”

When these criminal offenses are prosecuted without recourse to a provision of domestic law, consistent with Paragraph 3, instead of relying on domestic legal provisions, recourse must be made to customary international law as the basis for the prosecution. Just like international conventions, customary international law is recognized as a source of international law (see Article 38 of the Rome Statute of the International Court of Justice). In essence, a norm of customary international law is one that is recognized as general practice by states and that consequently creates obligations among states. To mount a prosecution against a person in the absence of domestic criminal provisions applicable at the time of commission of the criminal offense, the definitions of the criminal offenses of genocide, crimes against humanity, and war crimes must therefore be sourced from customary international law. The definition that should be applied is the one that was recognized under customary international law at the time the criminal offense was committed. Because the definitions of crimes against humanity have evolved considerably since they were first set out in the 1945 London Charter, some care may be necessary in prosecuting cases that occurred before the Statute of the International Criminal Court was adopted to ensure that texts are consistent with customary international law in force at the time. If problems arise, reference for guidance should be made to judgments of the ad hoc tribunals for Rwanda and the former Yugoslavia, to national prosecutions and legislation, to work of authoritative bodies such as the International Law Commission, and to academic commentators.

The prosecution of genocide, crimes against humanity, and war crimes may be undertaken in a post-conflict environment where justice is sought for such criminal offenses through the mechanism of the criminal justice system, even if these categories of crimes were not previously defined in national legislation. In the course of consultation on the MCC, many experts highlighted the fact that the criminal codes of many post-conflict states, such as Liberia and the Democratic Republic of the Congo (DRC), often lacked any provisions defining these criminal offenses. Thus, if prosecutions are to be brought against those accused of committing genocide, crimes against humanity, or war crimes, those prosecutions must be based on customary international law, as discussed above. This rule makes prosecutions much more complicated

than those based on provisions of domestic criminal law. In the alternative, a state could introduce legislation criminalizing genocide, crimes against humanity, and war crimes and prosecute these offenses retrospectively under this legislation without violating the principle of legality.

Paragraph 4: This paragraph sets forth the “strict construction” principle, a common feature of the principles of interpretation of criminal law in many states. Related to this principle is the ban on the use of analogy, an aspect of the principle of legality. The ban on analogy applies to the interpretation of substantive provisions of law. It also governs the manner in which evidence is assessed through the principle of *in dubio pro reo*, meaning that where there are doubts relating to evidence, the court should adopt the interpretation most favorable to the accused person.

Paragraphs 5 and 6: Related to the ban on the use of analogy is the principle that where interpretations of the law conflict, the one that most favors the accused should be applied. Paragraph 5 sets out this general principle, while Paragraph 6 applies it to the interpretation of penalties.