

Section 2: Offenses against Life and Limb

Article 89: Unlawful Killing

Article 89.1: Definition of Offense

A person commits the criminal offense of unlawful killing when he or she:

- (a) kills another person in a planned and deliberate manner;
- (b) kills another person with the intention to kill; or
- (c) kills another person recklessly or negligently.

Commentary

Reaching agreement upon a common definition of unlawful killing was one of the most difficult tasks to accomplish during the drafting of the MCC. Different legal systems diverge to such an extent on the precise scope and meaning of the terms *unlawful killing*, *murder*, *manslaughter*, and *homicide* that it was hard to find a definition that satisfied the experts consulted on this provision. It was even difficult to agree upon the title for this provision. Some advocated use of the terms *murder* and *manslaughter*, while others favored the use of *homicide*. Finding a suitable definition for use in the MCC was consequently not just a matter of taking a definition from another legal system. Instead, the drafters decided to create a new definition of *unlawful killing* (the agreed-upon term) that would incorporate elements from a variety of different states and legal systems.

The definition contained in Article 89 is a compromise between various definitions in domestic laws. Different states create various categories or scales of the criminal offense of killing another person, according to the seriousness of the basic offense adjudged in light of the mental element of the perpetrator. Thus the killing of another person is categorized according to whether it was planned, premeditated, desired,

intended, or committed recklessly or with gross negligence. By creating different categories of the criminal offense of killing another, it is then possible to assign different penalty ranges to them, depending on the level, heinousness, or seriousness of the killing. Obviously, the killing of a person with premeditation, for example, would merit a more severe penalty than the killing of a person through gross negligence.

Threats to kill are also deemed to be a criminal offense under the MCC. Reference should be made to Article 93 and its accompanying commentary.

Paragraph (a): Paragraph (a) sets out the most serious form of unlawful killing. There are various approaches to identifying the most serious forms of unlawful killing in domestic legal systems. In some systems, planning or premeditation is the defining feature of “murder in the first degree” or “premeditated murder.” Another commonly used approach establishes motives or special circumstances that have to accompany a killing to make such a killing “murder,” or “murder in the first degree,” as it is often known.

In some systems, such motives or circumstances are specifically defined. The legislation of different states makes specific references to sexual motives, motives related to greed, the facilitation of other criminal offenses, the evasion of criminal investigation and prosecution, escape from custody, and killing for profit. Other criminal codes refer to circumstances that make a particular killing the most serious of its kind, such as where the killing was carried out with particular cruelty or torture; multiple killings; where the circumstances of the killing endangered public safety; or the killing of specific types of persons, such as children, police officers, judges, government officials, and witnesses to criminal offenses. In quite a number of states, the most serious unlawful killings involve some element of premeditation or planning. Other states use less specific language, wherein a killing that is intentional and accompanied by heinous circumstances related to the act or motives will result in the killing being designated, for the purpose of penalties, as the most serious form of killing under domestic law. It is worth noting that in one state where the language was so open as to allow a broad interpretation by the domestic courts as to the assignment of the maximum penalty, the provision was held to be unconstitutional by the constitutional court. Imprecision in the definition of the most serious form of murder may also breach the principle of legality contained in Article 3 of the MCC.

While some states thus spell out aggravating factors that make a particular killing rise to the most serious form of killing, other states include no such factors. In their legal systems, all killings perpetrated with intention to kill or to cause serious or grievous bodily harm, or with “callous recklessness,” “extreme disregard for human life,” or “malice aforethought,” are defined as the most serious forms of unlawful killing. The term *murder* is commonly used to describe this form of killing. The experts consulted in the drafting of Article 89 considered whether or not to adopt this approach, and ultimately decided that it was in fact necessary to include another level above murder. After considering all the aggravating factors set out above that serve to define the most serious level of unlawful killing, the experts and the drafters agreed to define the most serious form of unlawful killing in terms of the planning, premeditation, and advance preparation that go into it.

Paragraph (b): Paragraph (b) defines a second, less serious category of unlawful killing, one that encompasses all other intentional killings (i.e., all unlawful killings committed without premeditation, planning, and/or other aggravating motives and circumstances). The definition of intention (see Article 18) provides that when a person kills another purposely or knowingly, then he or she may be found criminally responsible for the criminal offense of unlawful killing under Paragraph (b). Whereas some legal systems provide that either the intention to kill or the intention to cause serious bodily injury or harm will suffice for this level of unlawful killing, in Paragraph (b) only the intention to kill will suffice.

It is worth noting that some domestic legal systems have another category of unlawful killing below the level defined in Paragraph (b). This category of unlawful killing involves particularly mitigating circumstances. For example, a person would qualify under this lesser form of unlawful killing if he or she killed another following a serious demand to be killed by the victim or under extreme conditions such as stress or provocation. In other legal systems, when a person commits an intentional killing in such circumstances, he or she may avail of so-called partial defenses such as “provocation” and “diminished responsibility.” Where these partial defenses are found to exist, the person is liable for a lesser degree of unlawful killing, similar to the sort of unlawful killing set out in Paragraph (c). The MCC does not create the lesser form of unlawful killing under mitigating circumstances, nor does it contain provisions on partial defenses, as discussed in the commentary to Article 51(1)(a). Instead, provocation or diminished responsibility will be recognized as a mitigating factor at the stage of the determination of penalties. Reference should be made to Article 51(1)(a) and its accompanying commentary.

Paragraph (c): The third category of unlawful killing contained in the MCC equates to the offense known as manslaughter in many legal systems. It also includes the criminal offense of negligent homicide, contained in some legal systems. This category involves a person causing the death of another, although the person did not have the intention to kill but instead was reckless or negligent in doing so. Reference should be made to Article 18 and its accompanying commentary, which discuss the meaning and scope of the terms *recklessness* and *negligence*.

Article 89.2: Penalty

1. The applicable penalty range for the criminal offense of unlawful killing is:
 - (a) ten to thirty years’ imprisonment for a planned and deliberate killing;
 - (b) five to twenty years’ imprisonment for killing with intention to kill;
 - (c) three to fifteen years’ imprisonment for killing recklessly or negligently.
2. In exceptional circumstances, and in accordance with Article 49, the court may impose a penalty of life imprisonment for the criminal offense of planned and deliberate killing.

Article 90: Assault

Article 90.1: Definition of Offense

A person commits the criminal offense of assault when he or she, unlawfully:

- (a) threatens, by an act or gesture, to apply force to another person, if he or she causes that other person to believe on reasonable grounds that he or she has the present ability to effect his or her purpose; or
- (b) without the consent of another person, applies force intentionally to the other person, whether directly or indirectly.

Commentary

Some legal systems draw a distinction between assault (where a person is put in fear of the use of force against him or her) and battery (where force is used against a person). Article 90 covers the offenses of assault and battery (or criminal force, as it is known in some legal systems). Assault is contained in Paragraph (a), and battery is contained in Paragraph (b). The term *unlawfully* is used in this article to exclude cases of lawful use of force, for example, by a police officer lawfully using force in the course of his or her duties.

Force has been held in some states to include the application of heat, light, electric current, noise, or another other form of energy and the application of matter in solid, liquid, or gaseous form. Most courts in interpreting *force* have deemed that words alone cannot amount to an assault; an act or a gesture is required. Some commentators have argued that words alone should be allowable under the definition of assault. However, this argument is not universally accepted and has not been included in the definition of assault under Article 90. Paragraph (a) uses the term *present ability* to underscore the fact that the threatened use of force must be immediate. It further introduces an objective test (through the use of *reasonable grounds*) as to the apprehended use of force.

Article 90.2: Penalty

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

Article 91: Assault Causing Harm

Article 91.1: Definition of Offense

1. A person commits the criminal offense of assault causing harm when he or she assaults a person, causing him or her harm.
2. For the purposes of Article 91, *harm* means harm to the body or mind that includes pain and unconsciousness.

Commentary

Some legal systems define assault causing harm as “aggravated assault,” “grievous bodily harm,” “aggravated bodily harm,” or “assault occasioning actual bodily harm.” The aggravating factor that transforms assault into the criminal offense of assault causing harm differs from state to state. Some systems define the offense in relation to the means by which the assault was undertaken, whereas others define it in terms of its effects on the victim or in terms of both means and effects. The definition of assault causing harm under the MCC focuses on effects.

To prove that assault causing harm occurred, it is necessary to prove the elements of assault under Article 90, plus the infliction of harm as defined in Paragraph 2. Reference should be made to Article 90, “Assault,” and its accompanying commentary.

Article 91.2: Penalty

1. The applicable penalty range for the criminal offense of assault causing harm is two to ten years’ imprisonment.
2. The court may impose a fine, as a principal penalty, upon a person convicted of assault causing harm.

Article 92: Assault Causing Serious Harm

Article 92.1: Definition of Offense

1. A person commits the criminal offense of assault causing serious harm when he or she assaults another person, causing him or her serious harm.

2. For the purposes of Article 92, *serious harm* means the wounding, maiming, or disfiguring of a person or endangering his or her life.

Commentary

Some legal systems define assault causing serious harm as “aggravated assault,” “grievous bodily harm,” “aggravated bodily harm,” or “assault occasioning actual bodily harm.” The aggravating factor that transforms assault into the offense of assault causing serious harm differs from state to state. Some systems define the offense in relation to the means by which the assault was undertaken, whereas others define it in terms of its effects on the victim or in terms of both means and effects. The definition of assault causing serious harm under the MCC focuses on effects.

Proof of assault causing serious harm requires establishing the elements of assault under Article 90, plus the infliction of serious harm. Reference should be made to Article 90, “Assault,” and its accompanying commentary.

Article 92.2: Penalty

The applicable penalty range for the criminal offense of assault causing serious harm is three to fifteen years’ imprisonment.

Article 93: Threats to Kill or Cause Serious Harm

Article 93.1: Definition of Offense

1. A person commits the criminal offense of threatening to kill or cause serious harm when he or she:
 - (a) threatens to kill or cause serious harm to another person; and
 - (b) intending the other person to receive the threat, communicates it by any means to the person.
2. For the purposes of Article 93, *serious harm* has the same meaning as it does in Article 92.1(2).

Commentary

In addition to criminalizing the actual application of force under Article 90.1(b), harm under Article 91, and serious harm under Article 92, the MCC criminalizes threats to kill or cause serious harm, which are covered in Article 93. It is an essential element of the criminal offense that the perpetrator, with the intention that the other person receive the threat, communicates the threat by any means. It is not imperative that the person against whom the threat was directed actually received the threat, although this is normally the case.

Reference should be made to Article 92.1(2) for the meaning of *serious harm*.

Article 93.2: Penalty

1. The applicable penalty range for the criminal offense of threat to kill or cause serious harm is one to five years' imprisonment.
2. The court may impose a fine, as a principal penalty, upon a person convicted of threat to kill or cause serious harm.