Section 4: Offenses against the Rights of Persons

Article 101: Torture

Article 101.1: Definition of Offense

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

(a) intentionally inflicts severe pain or suffering, whether physical or mental, upon a person in his or her custody or under his or her control;

(b) for such purposes as to obtain from him or her, or a third person, information or a confession, or to punish him or her for a criminal offense that he or she, or a third person, has perpetrated or is suspected of having perpetrated, or to intimidate or coerce him or her, or a third person, for any other reason based on discrimination of any kind.

Commentary

The right of a person to be free from torture is one that is protected by many international instruments, including the Universal Declaration of Human Rights (Article 5), the International Covenant on Civil and Political Rights (Article 7), the American Convention on Human Rights (Article 5), the African Charter on Human and People's Rights (Article 5), and the Convention on the Rights of the Child (Article 37). The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was drafted and adopted in 1984. Article 4 of the convention requires that a state party "ensure that all acts of torture are offenses under its criminal law."

In Article 1, the convention contains a definition of torture that is used as the basis for the wording of Article 101.1 of the MCC. Under the definition of torture in the United Nations convention, there are three requisite elements of the offense: (1) the

infliction of "severe pain or suffering" (discussed below); (2) for a number of purposes listed in the convention (discussed below); and (3) at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The first two elements of the United Nations convention definition of torture are contained in Article 101. In contrast to the United Nations definition, Article 101 does not require that the act of torture be committed by a public official or an associated person. Thus the definition broadens the scope of the criminal offense of torture. In a state marred by conflict, and often in post-conflict states, torture can be perpetrated by public officials but also by indirect state actors, guerrilla movements, paramilitary groups, and organized criminal groups. It is often difficult to find substantial proof that a person acted at the instigation or with the consent or acquiescence of a public official. To ensure the full protection of a person from torture, the offense applies to a state or a nonstate actor where the victim is "in his or her custody or under his or her control."

It is important to note that torture may be either physical or mental. A common misconception is that torture involves merely physical acts. Article 2 of the Inter-American Convention to Prevent and Punish Torture elaborates on this point, stating that "torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish." The definition of torture does not contain a definitive list of acts that constitute torture because the perpetrators of torture continuously devise new methods of torture. Therefore it is impossible to define the full range of acts of torture. Many of the new techniques are more subtle, performed with the hope of their escaping definition as acts of torture. It is also important to note that the list of purposes set out in Paragraph (b) is not exhaustive, illustrated by use of the phrase *for such purposes as*.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires that, in addition to penalizing the principal perpetrator of an act of torture, domestic criminal legislation also penalize persons who are complicit or who participate in torture. This issue is covered in Section 11 of the General Part of the MCC. Reference should be made to Articles 27–31 and their accompanying commentaries. The convention also requires that criminal jurisdiction be asserted, if the state considers it appropriate, when the criminal offense of torture is committed on the territory of a state or on board a ship or aircraft registered in the state, when the alleged offender is a national of the state, or when the victim is a national of that state (Article 5). It also provides that a state may assert universal jurisdiction over acts of torture. The grounds of jurisdiction, both mandatory and discretionary, contained in the convention are covered in the MCC under Article 4 ("Territorial Jurisdiction"), Article 5 ("Extraterritorial Jurisdiction"), and Article 6 ("Universal Jurisdiction").

Furthermore, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment declares, under Article 2(3), that orders to commit torture may not be invoked as justification for acts of torture. Reference should be made to Article 22 ("Superior Orders"), where orders to commit torture are declared manifestly unlawful. Finally, the convention contains numerous other procedural provisions, in addition to substantive provisions, on issues such as investigation and prosecution of torture (Articles 6, 7, and 12), extradition (Article 8), mutual legal assistance (Article 9), training of law enforcement and criminal justice personnel (Article

10), the right to complain and seek redress for acts of torture (Articles 13 and 14), the prevention of cruel, inhuman, and degrading treatment (Article 16), and the exclusion of evidence obtained through torture (Article 15). Many of these obligations are dealt with in the MCCP. Reference should be made to Chapter 14, Part 2, on extradition, Chapter 14, Part 1, on mutual legal assistance, and Chapter 11, Part 3, which addresses exclusion of evidence obtained through torture.

For the investigation of acts of torture, reference can be made to the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Istanbul Protocol) and *Combating Torture: A Manual for Judges and Prosecutors*, produced by the Human Rights Centre, University of Essex. Reference should also be made, more generally, to the work of the United Nations Special Rapporteur on Torture and the United Nations Committee against Torture. Also of relevance is the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), set up under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The CPT has published a report entitled *The CPT Standards: "Substantive" Sections of the CPT's General Reports,* which provides helpful guidance on the prevention of torture.

Acts of torture may be committed as part of the criminal offenses of genocide, crimes against humanity, and war crimes. Reference should be made to Articles 86–88 of the MCC and their accompanying commentaries.

Article 101.2: Penalty

The applicable penalty range for the criminal offense of torture is five to twenty years' imprisonment.

Article 102: Trafficking in Persons

Article 102.1: Definition of Offense

1. A person commits the criminal offense of trafficking in persons when he or she, for the purpose of exploitation:
   (a) recruits, transports, transfers, harbors, or receives persons;
   (b) by means of:
      (i) the threat or use of force or other forms of coercion;
      (ii) abduction;
      (iii) fraud;

(iv) deception;

(v) the abuse of power or a position of vulnerability; or

(vi) the giving or receiving of payments or benefits to achieve the consent of a person having control over another person;

2. Exploitation includes, at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.

3. The consent of a victim of trafficking in persons to the intended exploitation is irrelevant where any of the means set forth in Paragraph 1(b) have been used.

4. The recruitment, transportation, transfer, harboring, or receipt of a child for the purpose of exploitation is considered trafficking in persons, even if the act does not involve any of the means set forth in Paragraph 1(b).

Commentary

Given the usual absence of a strong criminal justice system in a post-conflict state, organized criminal elements often operate with impunity. One of the fastest-growing criminal activities in post-conflict states is trafficking in persons. From Sierra Leone to Kosovo to Bosnia and Herzegovina to Liberia, domestic and international authorities have been faced with massive problems of trafficking in persons. According to *Human Trafficking and United Nations Peacekeeping: DPKO Policy Paper* (March 2004), "[H]uman trafficking is a destructive phenomenon afflicting many post-conflict environments and which can seriously impede UN peacekeeping and other UN objectives in host countries" (paragraph 3). It also violates many fundamental human rights of victims, including freedom from slavery; freedom from torture; freedom from cruel, inhuman, or degrading treatment; and freedom of liberty, to name a few.

Often, a primary difficulty in dealing with this widespread crime problem in post-conflict states is the fact that domestic legislation is outdated and does not contain the criminal offense of trafficking in persons. Many acts committed while persons are being trafficked (e.g., kidnapping or assault) may fall under different criminal offenses already contained in domestic law. However, the criminal act of trafficking has generally not been criminalized. In addition to the inclusion of the substantive offense of trafficking in domestic law, other provisions are required to combat and investigate trafficking and to deal with the victims of trafficking, as is discussed below. In many post-conflict states, much attention has been focused on the problem of trafficking, including the adoption of legislation implementing the substantive and procedural provisions required to investigate and prosecute this criminal offense.

In Kosovo, in the aftermath of the conflict, UNMIK Regulation 2001/4 on the Prohibition of Trafficking in Persons in Kosovo was promulgated. This regulation introduced both substantive and procedural provisions aimed at tackling the problem of trafficking in persons. The United Nations Mission in Kosovo also established five

regional special police antitrafficking units, and a Victim Advocacy and Assistance Unit was established to coordinate an assistance policy for victims of trafficking. In Bosnia and Herzegovina, the United Nations Mission in Bosnia and the Office of the High Commissioner for Human Rights established the Special Trafficking Operations Programme (STOP). The details of STOP are discussed in great detail in *Women, Peace and Security*, a study submitted to the Security Council by the secretary-general in 2000.

There have been a number of regional conventions specifically on trafficking, including the Inter-American Convention on International Traffic in Minors and the South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. In addition, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Article 4(2)(g), provides that trafficking in women be prevented, condemned, and prosecuted. Many other instruments have dealt with aspects of trafficking in persons, such as slavery, forced labor, or slavery for the purpose of sexual exploitation. A full list is contained on page 262 of the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto.*

The first internationally agreed upon definition of trafficking is contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. The purpose of the protocol is to prevent and combat trafficking, protect and support the victims of trafficking, and promote cooperation between states parties to the convention (Article 2). The convention contains not only provisions on the criminalization of trafficking (Article 5) and the procedural measures necessary to investigate and prosecute trafficking but also provisions on the protection of victims of trafficking in persons (chapter 2), the prevention of trafficking, cooperation between states, and other measures (chapter 3). In addition to these obligations, according to Article 1 of the protocol, the obligations contained in the Convention against Transnational Organized Crime apply unless otherwise provided for in the protocol. Reference should therefore be made to the commentary to Article 136, which discusses the relevant obligations under the convention.

It is worth noting that two additions to the domestic criminal law, outlined in the United Nations Convention against Transnational Organized Crime, are particularly important for the investigation and prosecution of trafficking in persons. First, witness protection measures as contained in Chapter 8, Part 4, Section 1, of the MCCP (and referenced in Article 24 of the United Nations Convention against Transnational Organized Crime) are vitally important to ensure the safety of trafficking victims who testify at trial. Often, it is impossible to persuade a victim of trafficking to testify without an assurance of safety and protection. Reference should be made to the relevant sections of the MCCP and their accompanying commentaries. Second, covert surveillance measures (dealt with under Article 20 of the convention) are important for investigating trafficking in persons, as with other organized criminal activities.

A full discussion of all the obligations under the convention and the protocol is outside the scope of this commentary. Reference should be made to the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto.* Reference should also be made to the *Interpretative Notes for the*

Official Records of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (UN document A/55/383/Add.1) and *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council* (UN document E/2002/68/Add.1). The Central European and Eurasian Law Initiative (CEELI) has published *Human Trafficking Assessment Tool and An Introduction to the Human Rights Assessment Tool: An Assessment Tool Based on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime,* and the International Human Rights Law Group has published *The Annotated Guide to the Complete UN Trafficking Protocol.* For a discussion of trafficking in the context of peace operations and current United Nations policy, reference should be made to *Human Trafficking and United Nations Peacekeeping: DPKO Policy Paper* (March 2004).

Paragraph 1: The wording of Paragraph 1 comes from Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. The *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (page 268) breaks the criminal offense down into three constituent elements: (1) the action (recruitment, transportation, transfer, harboring, or receipt of persons); (2) the means (threat, use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person); and (3) the purpose (exploitation). The legislative guide states, on page 268, that the obligation upon states parties to the convention is "to criminalize trafficking as a combination of constituent elements and not the elements themselves." This means that a state must implement the definition of trafficking contained in Article 3(a) of the protocol.

CEELI's *An Introduction to the Human Rights Assessment Tool* contains an extremely detailed discussion on the precise meaning of the action, means, and purposes of trafficking, having recourse to domestic legislation of different states to see how they have interpreted the provisions of the protocol (see pages 31–44). A full discussion of this issue is beyond the scope of this commentary, and reference should be made to the valuable resource just mentioned, in addition to the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto.*

Article 5 of the protocol requires that an attempt to commit the criminal offenses of trafficking or participation as an accomplice and of organizing or directing trafficking be criminalized. In the MCC, these obligations are covered under Articles 27, 29, and 31. Reference should be made to the relevant articles and their accompanying commentaries.

Paragraph 2: The wording of Paragraph 2 comes from Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. It is worth noting that this list is illustrative and not exhaustive. Other

exploitation purposes, such as the use of victims in armed conflicts or in the pornography industry—examples given in CEELI's *Human Trafficking Assessment Tool* (page 39)—may also fulfill the requisite element of exploitation in the offense of trafficking in persons. The CEELI trafficking tool provides useful descriptions and definitions of the forms of exploitation mentioned in Paragraph 2 (see pages 38–44).

Paragraph 3: Ordinarily, consent can be used by the alleged perpetrator of a criminal offense as a defense to the criminal offense of trafficking. In such cases, the court will assess whether or not the consent is true and informed. For example, if a person aware of all the factual circumstances at hand fully consented to be recruited, transported, transferred, or harbored (the means set out in Paragraph 1) for an apparently exploitative purpose such as prostitution, this would not constitute trafficking in persons. Instead, the person or persons who transported the person from one state to another could be liable for migrant smuggling under Article 137. Where any of the means mentioned in Paragraph 1(b) are used, however, the consent of the victim cannot be described as true consent. Through the inclusion of Paragraph 3, the potential for the alleged perpetrator to raise consent as a defense is cut off when any exploitative means have been employed. It is vital that this paragraph be included as an accompaniment to the substantive offense of trafficking in persons.

Paragraph 4: In a case of trafficking involving a child, meaning a person below the age of eighteen years, the issue of consent is completely irrelevant. Therefore, it does not matter whether the means set out in Paragraph 1 were used or not; there are no circumstances in which a child can consent to be recruited, transported, transferred, or harbored for an apparently exploitative purpose such as prostitution. Consequently, the prosecutor will need only to prove that the recruitment, transportation, transfer, harboring, or receipt was for the purpose of exploitation. The CEELI trafficking tool has criticized the protocol for not adequately dealing with the rights of trafficked child victims (see pages 45–46). The *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council* (UN document E/2002/68/Add.1) provides a number of valuable suggestions on how to do so and should be referred to by a state implementing legislation on trafficking in persons.

Article 102.2: Penalty

The applicable penalty range for the criminal offense of trafficking in persons is three to fifteen years' imprisonment.

Article 103: Establishing Slavery, Slavery-like Conditions, and Forced Labor

Article 103.1: Definition of Offense

A person commits the criminal offense of establishing slavery, slavery-like conditions, and forced labor when he or she, and with the intention of establishing slavery, slavery-like conditions, or forced labor:

(a) places, holds, maintains, purchases, sells, hands over, or delivers a person into slavery, slavery-like conditions, or forced labor;

(b) mediates the purchase, sale, or handing over of another person into slavery, slavery-like conditions, or forced labor; or

(c) induces someone to sell his or her freedom into slavery, slavery-like conditions, or forced labor.

Commentary

The criminal offense of establishing slavery, slavery-like conditions, and forced labor under Article 103 is in some respects related to the offense of trafficking in persons under Article 102, as trafficking may involve the exploitation of a person through slavery, practices similar to slavery, and forced labor. Slavery was the first human rights issue to arouse international concern. The first international convention concerning slavery drawn up under the League of Nations (the predecessor to the United Nations) was the Slavery Convention of 1926, followed by the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others in 1949. (A supplementary convention to the 1926 convention was drafted in 1956.) Slavery still remains a problem in contemporary society. Slavery is defined under Article 1(1) of the 1926 convention as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." There are numerous examples of slavery-like conditions, including debt bondage, serfdom, forced marriage, and sale of children, some of which are dealt with in Article 1 of the 1956 supplementary convention to the 1926 convention. The United Nations Working Group on Contemporary Forms of Slavery has discussed other slavery-like conditions, including child labor (also falling under the definition of forced labor) and forced recruitment of children in armed conflict. Forced labor is defined by the International Labor Organization's Forced Labor Convention No. 29, Article 2(1), as "all work or service which is exacted from any person under the menace of any penalty for which the said person has not offered himself voluntarily."

Under Article 103, a variety of different acts and actors involved in putting a person into slavery, slavery-like practices, or forced labor, or keeping the person in this condition are penalized. Unlike under Article 102, above, there is no need to prove that illegitimate means were used in placing or inducing a person into slavery, slavery-like practices, or forced labor.

For further discussion on issues relating to slavery, including its prevention and other methods of addressing the problem, reference should be made to the work of the United Nations Working Group on Contemporary Forms of Slavery.

It is important to note that to convict a person of slavery, the intention to establish slavery, slavery-like conditions, or forced labor will have to be established. For example, if a taxi driver unknowingly delivers a person into slavery, he or she cannot be convicted of the criminal offense unless he or she had the requisite intention to establish slavery, slavery-like conditions, or forced labor.

Article 103.2: Penalty

The applicable penalty range for the criminal offense of establishing slavery, slavery-like conditions, or forced labor is three to fifteen years' imprisonment.

Article 104: Enforced Disappearance

Article 104.1: Definition of Offense

A person commits the criminal offense of enforced disappearance when he or she deprives another person of his or her liberty, in whatever form or for whatever reason, brought about by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information, or refusal to acknowledge the deprivation of liberty or information, or concealment of the fate or whereabouts of the disappeared person.

Commentary

Typically, an enforced disappearance involves a person being removed by an official of the state (e.g., a police officer or member of the military) from his or her home or other location without any arrest warrant and without any notification of where he or she will be held, after which the person is never seen again by his or her family. In many

cases, the victim of an enforced disappearance is tortured and then killed, and his or her body is disposed of without the knowledge of the family.

Enforced disappearances breach a variety of individual rights of the victim—such as the right to life; freedom from torture or cruel, inhuman, and degrading treatment or punishment; the right to liberty and security; and the right to recognition as a person before the law—and rights of the person's family in the sphere of economic rights (e.g., depriving a family not only of a member but also of its main earner). As stated in the *Report Submitted by Mr. Manfred Nowak, Independent Expert Charged with Examining the Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances, Pursuant to Paragraph 11 of the Commission Resolution 2001/46* (UN document E/CN.4/2002/71, January 8, 2001, paragraph 70): "[E]nforced disappearance is a very complex and cumulative violation of human rights and humanitarian law." Disappearances are now a global phenomenon and often occur in states suffering from internal armed conflicts. Many individuals in post-conflict states are victims of enforced disappearances, their relatives having been "disappeared" by officials of a prior regime. In other states, enforced disappearance continues to be used as a tool of political repression.

A number of international instruments address the phenomenon of enforced disappearance, including the Inter-American Convention on Forced Disappearance of Persons, the United Nations Declaration on the Protection of All Persons from Enforced Disappearances, and the United Nations International Convention on the Protection of All Persons from Forced Disappearances. The wording of Article 104 is taken from Article 1 of the United Nations International Convention on the Protection of All Persons from Forced Disappearances, which is very similar to the wording contained in the Inter-American Convention on Forced Disappearance of Persons. According to Article 7 of the United Nations convention, a state must adopt the necessary legislative measures to define an enforced disappearance as an independent offense. In order to comply with the obligation contained in the convention, it is not enough that the state rely on preexisting provisions of law on deprivation of liberty, torture, intimidation, excessive violence, and so on; enforced disappearances must constitute a separate offense.

In addition to the substantive requirement to introduce a criminal offense of enforced disappearance, the United Nations International Convention on the Protection of All Persons from Forced Disappearances contains several procedural requirements that a state should look at in order to create a full protective framework against enforced disappearance. One of the most useful mechanisms in protecting persons against the possibility of enforced disappearance is a habeas corpus mechanism, whereby any person can petition the court where another person has been detained illegally. Reference should be made to Chapter 15 of the MCCP. Also of great importance in combating enforced disappearance are the procedural provisions relating to detention. In this regard, reference should be made to the Model Detention Act.

The criminal offense of enforced disappearance is also recognized as an international crime, specifically a crime against humanity—see Article 7(1)(i) of the *Statute of the International Criminal Court* and Article 3 of the *International Convention on the*

Protection of All Persons from Forced Disappearance. Reference should be made to Article 87 of the MCC and its accompanying commentary.

Article 104.2: Penalty

The applicable penalty range for the criminal offense of enforced disappearance is three to fifteen years' imprisonment.

Article 105: Domestic Violence

Article 105.1: Definition of Offense

1. A person commits the criminal offense of domestic violence when he or she commits any of the following criminal offenses against a person with whom he or she has a domestic relationship:
   (a) rape as defined in Article 94;
   (b) sexual intercourse or acts of a sexual nature with a child below the age of consent to sexual relations as defined in Article 95;
   (c) violation of the sexual autonomy of a defenseless person as defined in Article 96;
   (d) violation of sexual autonomy by abuse of authority as defined in Article 97;
   (e) sexual slavery as defined in Article 98;
   (f) enforced prostitution as defined in Article 99;
   (g) sexual violence as defined in Article 100;
   (h) assault as defined in Article 90;
   (i) assault causing harm as defined in Article 91;
   (j) assault causing serious harm as defined in Article 92;
   (k) threat to kill or cause serious harm as defined in Article 93;
   (l) kidnapping as defined in Article 106;
   (m) unlawful deprivation of liberty as defined in Article 107;
   (n) establishing slavery, slavery-like conditions, or forced labor as defined in Article 103;

(o) arson as defined in Article 131; and

(p) criminal damage as defined in Article 133.

2. For the purposes of Article 105, *domestic relationship* means a relationship between:

(a) a husband and wife or former husband and wife;

(b) a women and a man who are cohabiting without marriage;

(c) a boyfriend and girlfriend;

(d) two people who are related by marriage, blood, or adoption or by a guardian relationship;

(e) a person and a household worker.

Commentary

Paragraph 1: In earlier drafts of the MCC, domestic violence was addressed much as it was in many domestic criminal codes—as an aggravating factor relevant to the penalties of certain offenses. Consequently, if the particular criminal offenses set out in Paragraph 1(a) were committed in the context of a domestic relationship as defined in Paragraph 2, the applicable penalty range of the relevant offense could be augmented. While there was agreement among the drafters and experts consulted during the process of vetting the MCC that the commission of a criminal offense against a victim with whom the perpetrator had a domestic relationship merited special attention, and also merited augmentation of the applicable penalty for the underlying offense committed, there was much debate about whether the MCC should treat domestic violence as an aggravating factor or should include a separate definition of domestic violence. As a compromise, it was agreed that domestic violence should be contained in a separate provision, while the applicable penalty ranges should be determined by reference to the applicable penalty ranges of the predicate, or underlying, offenses of domestic violence—that is, those offenses set out in Paragraph 1 of this article.

There are a number of reasons for recognizing domestic violence as a separate criminal offense in the MCC. First, by giving the criminal offense of domestic violence its own autonomous provision, the drafters sought to highlight the necessity of adequately addressing this issue in a post-conflict state. Many post-conflict states have experienced a considerable upsurge in domestic violence in the aftermath of conflict. In East Timor, for example, domestic violence was reportedly the most widely perpetrated criminal offense in 2000, one year after the cessation of conflict. This elevated level of domestic violence was probably driven by several different factors, including the high incidence of post-traumatic stress disorder among former combatants, increased unemployment, and a widespread sense of the acceptability of violence after years of conflict. *Women, Peace and Security* discusses the urgent need to address domestic violence (see paragraphs 278–286) and recommends that post-conflict states undertake legal reforms to address the issue (see paragraph 392).

The second reason for the inclusion of domestic violence as a separate criminal offense of domestic violence goes beyond the specific needs of a post-conflict state and relates also to non-post-conflict states. This reason goes to the need to set domestic violence apart from other criminal offenses on account of its distinguishing feature: acts of physical, psychological, or sexual violence that occur within the private sphere and violate the rights of an individual in a domestic relationship with the perpetrator as defined in Paragraph 2. Historically, and in some states even today, there has been a reticence to acknowledge the interest of a state in criminalizing acts of violence that occur in the private sphere, for example, between a husband and a wife. Recently, however, there has been a growing movement worldwide to recognize the state's interest in acts of violence that occur in the private sphere and to introduce specific legislation regarding them.

The United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences has stated that where domestic violence is not recognized as a separate criminal offense, and where prosecutions are brought under other general laws, such as those dealing with assault or battery, "cases are rarely prosecuted and women continue … to suffer in silence" (see *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women*, UN document E/CN.4/2003/75, paragraph 26). The United Nations Committee on the Convention for the Elimination of Discrimination against Women (established under the convention), in General Recommendation No. 19, requires states parties to the convention to introduce specific legislation on violence against women, as does the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Article 7, and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Article 4(2).

Some experts consulted during the drafting of the MCC argued that the provision should refer only to violence perpetrated against women, since statistically domestic violence against men is not very common, and international efforts to combat domestic violence tend to focus on the need to protect women, not men. The *Framework for Model Legislation on Domestic Violence*, drafted by the Special Rapporteur on Violence against Women, Its Causes and Consequences and adopted by the United Nations Commission on Human Rights (see UN document E/CN.4/1996/53/Add.2), states in paragraph 2(b) that domestic violence is "gender-specific violence directed against women." That said, at a domestic level, legislation has been introduced that protects both men and women from abuse within a domestic relationship. While acknowledging that domestic violence predominantly affects women and stems from historical and traditional power imbalances between the two genders, the drafters of the MCC chose to follow an approach that covered domestic violence against both men and women.

After dealing with the question of whom should be covered by the offense of domestic violence, the drafters considered a further issue: Which offenses should be contained in the provision? The particular criminal offenses included in Article 105 as the predicate offenses for domestic violence are those offenses contained in the MCC that involve physical, psychological, and sexual violence. The most common forms of domestic violence include battering of women, marital rape, incest, forced prostitution, violence against domestic workers, violence against female children, and tradi-

tional practices affecting the health of women and children. Domestic violence also includes acts of psychological violence such as intimidation, coercion, stalking, and verbal abuse. Furthermore, property offenses such as arson and criminal damage have been included in domestic violence legislation, an approach that has been followed in the MCC.

The introduction of a substantive criminal offense is not, however, sufficient to effectively combat domestic violence in a post-conflict state. At the level of legislative reform, other modifications of the legal framework have to be made; in particular, criminal procedure reforms must be introduced to enable domestic violence to be successfully investigated and prosecuted. A collection of suggested procedural reforms relating to domestic violence investigation and prosecution is set out in the *Framework for Model Legislation on Domestic Violence*, mentioned above. It includes procedural provisions addressing issues such as the duty of police officers to respond to requests for assistance in cases of domestic violence; the requirement that police officers complete a domestic violence report after responding to a domestic violence complaint; the rights of victims of domestic violence; and the duties of criminal justice actors in investigating, prosecuting, and trying domestic violence cases. Reference should also be made to the annex to Crime Prevention and Criminal Justice Measures to Eliminate Violence against Women (United Nations General Assembly Resolution 1998/86), which discusses procedural requirements relating to criminal procedure, police, and sentencing and corrections. The *Framework for Model Legislation on Domestic Violence* also refers to complementary reforms in the civil law sphere required to supplement criminal legislation on domestic violence. It is essential for a state wishing to tackle the problem of domestic violence to implement laws that provide for temporary restraining orders or more long-term protective measures, such as protection orders in favor of victims of domestic violence.

In addition to criminal and civil law reforms, a post-conflict state tackling the problem of domestic violence must also look to other measures, such as the training and sensitization of police officers or other criminal justice actors involved in the investigation, prosecution, or adjudication of domestic violence cases. Some states have also undertaken institutional reforms, such as establishing special police units (often staffed by female police officers), or even special police stations, to deal solely with domestic violence. Rehabilitative measures aimed at treating the victims of domestic violence may also be required. Victims may need counseling, health care, and social services. Often, such services are provided by nongovernmental organizations working in conjunction with the state. Services such as the establishment and running of hotlines for reporting incidents of domestic violence, and the provision of shelters to house the victims of domestic violence who cannot return home, may also be required. Reference may be made to the International Centre for Criminal Law Reform and Criminal Justice Policy manual entitled *Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice*, which discusses the substantive and procedural reforms required to address domestic violence, as well as training, sensitization, service delivery for victims of domestic violence, and institutional reforms.

Given that many post-conflict states exhibit a cultural acceptance of domestic violence, other measures have focused on public awareness, public dialogue, and

public education campaigns. In East Timor, for example, when the laws on domestic violence were being drafted, a sixteen-day campaign against domestic violence was implemented. The United Nations Mission in East Timor also worked with specific sectors of society; for example, it provided journalists with training on gender-sensitive reporting of domestic violence.

Paragraph 2: The definition of domestic relationship is taken from paragraph 7 of the *Framework for Model Legislation on Domestic Violence*, drafted by the Special Rapporteur on Violence against Women, Its Causes and Consequences. This definition is relatively wide in order to include all the sorts of domestic relationships within which domestic violence commonly occurs, including those involving female household workers, who are commonly the subject of domestic violence in the homes in which they work and live.

Article 105.2: Penalty

The applicable penalty range for the criminal offense of domestic violence must be calculated by augmenting the maximum applicable penalty for the relevant predicate criminal offense set out in Article 105.1(1) by one-half.

Commentary

As mentioned in the commentary to Article 105, the drafters of the MCC decided to create a separate criminal offense of domestic violence. But instead of determining separate penalties for domestic violence, they decided that the applicable penalties should be determined by reference to the penalties for the predicate offenses of domestic violence. For example, if an act of assault is perpetrated against a victim who is in a domestic relationship with the perpetrator, then the appropriate penalty range is that for assault, plus augmentation to the maximum penalty set out in Article 105.2. In this case, the applicable penalty range will be one to seven and one-half years (the original penalty range for assault is one to five years). Adopting this sort of approach to the penalties for domestic violence seemed the most straightforward solution, as all the different predicate offenses of domestic violence carry varying penalty ranges, based on the seriousness of the predicate offense. The drafters originally struggled to find an appropriate one-size-fits-all penalty range for the vast array of predicate offenses covered in Article 105.1(1) and eventually resolved to adopt an approach to the designation of an appropriate penalty range that is unique in the MCC.

Article 106: Kidnapping

Article 106.1: Definition of Offense

A person commits the criminal offense of kidnapping when he or she takes or detains another person, without the other person's consent, with the intention of:

(a) holding that other person to ransom or as a hostage;

(b) taking or sending that other person out of the jurisdiction; or

(c) committing a criminal offense against that person or a third person.

Commentary

Kidnapping—particularly the kidnapping of international personnel—has become a widespread occurrence in post-conflict states such as Cambodia, Iraq, and Nepal. In some post-conflict environments, kidnapping has been perpetrated by terrorist groups to inflame tensions and stoke insecurity; in others states, organized criminal groups have used kidnapping to make money. The phenomenon of kidnapping has become so serious that the Economic and Social Council of the United Nations has twice asked the secretary-general to produce a report on the subject. Reference should be made to two reports, one published in 2003 and the other in 2004 but both having the same title, *International Cooperation in the Prevention, Combating and Elimination of Kidnapping and in Providing Assistance to Victims* (UN document E/CN.15/2003/7 and UN document E/CN.15/2004/7, respectively). Both reports contain information on how to combat kidnapping, and they posit a variety of legal responses, operational practices required to deal with kidnapping, and preventive strategies.

The criminal offense of kidnapping is a form of aggravated unlawful deprivation of liberty (under Article 107). Both offenses involve the taking or detaining of another person without his or her consent. Unlawful deprivation of liberty rises to the level of kidnapping, and therefore enters a higher penalty range, when any of the three aggravating factors above are present. The wording of Article 106 is taken from Section 5.1.30 of the Australian Model Penal Code. For more detail on kidnapping's precise scope and meaning, reference should be made to the code and its commentaries.

Article 35 of the Convention on the Rights of the Child instructs states to take all appropriate measures to prevent the abduction of children out of the jurisdiction. These measures include criminalizing this offense. Some states recognize a separate offense of child abduction, in addition to kidnapping. Under the MCC, the offense of kidnapping encapsulates the kidnapping or abduction of children.

The Australian code states that "a person who takes or detains a child is to be treated as acting without the consent of the child." The Committee on the Rights of the Child (a body set up under the Convention on the Rights of the Child to monitor

compliance with state obligations under the convention) has debated whether the offense of child abduction should include a situation in which a child consents to leave one guardian in favor of another. According to the commentary to the Australian Model Criminal Code (page 89), the committee believes it should not. For example, a teenage girl who leaves the custody of a parent in favor of living with an aunt would not open the aunt to criminal prosecution. A state implementing a new provision on kidnapping should consider which of these positions it wishes to take. Where the consent of a child is permissible, the court will have to assess whether the consent was genuine.

Article 106.2: Penalty

The applicable penalty range for the criminal offense of kidnapping is three to fifteen years' imprisonment.

Article 107: Unlawful Deprivation of Liberty

Article 107.1: Definition of Offense

A person commits the criminal offense of unlawful deprivation of liberty when he or she takes or detains another person, or otherwise restricts the personal liberty of another person, without lawful authority and without the consent of that person.

Commentary

The criminal offense of unlawful deprivation of liberty is known as false imprisonment in many states. To negate this offense, consent of the victim may be proven. In this case, consent must be genuine.

Article 107.2: Penalty

The applicable penalty range for the criminal offense of deprivation of liberty is two to ten years' imprisonment.

Article 108: Criminal Coercion

Article 108.1: Definition of Offense

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

(a) by use of force, or threat of serious harm;

(b) compels a person to do or refrain from doing an act.

Article 108.2: Penalty

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

Article 109: Unauthorized Search of a Person and His or Her Belongings

Article 109.1: Definition of Offense

A person commits the criminal offense of unauthorized search of a person or of items in his or her possession when he or she, without lawful authorization or without the consent of that person:

(a) conducts a search of another person; or

(b) conducts a search of his or her belongings or items in his or her possession.

Commentary

Unauthorized search of a person or his or her belongings is criminalized because it represents a substantial and unjustified intrusion into the privacy of an individual. The right to privacy is protected under the constitutions or domestic legislation of many

states and also protected under international and regional human rights instruments, such as the International Covenant on Civil and Political Rights, Article 17; the Convention on the Rights of the Child, Article 40(2)(b)(vii); the European Convention on Human Rights and Fundamental Freedoms, Article 8; the American Convention on Human Rights, Article 11; and the African Charter on the Rights and Welfare of the Child, Article 10. The right to privacy is a "limited" as opposed to an "absolute" right, and therefore intrusions can sometimes be justified on grounds such as public safety, the protection of the rights and freedoms of others, and the prevention of disorder or crime—all of which are articulated in Article 8(2) of the European Convention on Human Rights and Fundamental Freedoms.

Article 109 applies to all persons, including public officials and policing officials. With regard to policing officials, Chapter 8, Part 3, Section 4, of the MCCP contains detailed provisions on the search of persons, as does the Model Police Powers Act. Where a policing official conducting a search of a person acts outside the scope of the powers bestowed upon him or her by the MCCP or the Model Police Powers Act, and therefore acts unlawfully, he or she may be liable to criminal prosecution under Article 109. Reference should be made to the relevant section of the MCCP and the Model Police Powers Act and their accompanying commentaries.

Article 109.2: Penalty

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

Article 110: Unauthorized Search of a Dwelling or Premises

Article 110.1: Definition of Offense

A person commits the criminal offense of unauthorized search of a dwelling or premises when he or she:

(a) conducts a search of a dwelling or private premises;

(b) without lawful authorization or without the consent of that person.

Commentary

This provision applies to both public officials and nonpublic officials.

With regard to policing officials, Chapter 8, Part 3, Section 4, of the MCCP contains detailed provisions on the search of a dwelling or premises. A similar provision on search (outside the context of criminal investigation) is contained in the Model Police Powers Act. Reference should be made to the MCCP and the Model Police Powers Act and their accompanying commentaries. The search of dwellings or premises represents an intrusion on the right to privacy—a right protected under the constitutions or domestic legislation of many states, as discussed in greater detail above under Article 109. Under the MCCP and the Model Police Powers Act, the right to privacy of an individual has been carefully balanced against these grounds. If a policing official follows these provisions, there will be no violation of the right to privacy; the policing official will possess "lawful authorization." Without lawful authorization to conduct a search of a dwelling or premises, a policing official may be liable for a criminal offense under Article 110.

Article 110.2: Penalty

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

Article 111: Unauthorized Visual Recording

Article 111.1: Definition of Offense

1. A person commits the criminal offense of unauthorized visual recording when he or she:
   (a) takes one or more photographs or other visual recordings by technical means of a person or his or her dwelling or private premises;
   (b) without lawful authorization or the consent of the person concerned; and
   (c) by taking a photograph or photographs or other visual recordings unjustifiably interferes with that person's reasonable expectation of privacy.

2. A person also commits a criminal offense of unauthorized visual recording when he or she:
   (a) transmits or presents one or more photographs or other visual recordings by technical means of a person or his or her dwelling or private premises to a third person or otherwise intentionally enables a third person to see such photographs or recordings;
   (b) without lawful authorization or the consent of the person concerned; and
   (c) by transmitting or presenting the photograph or photographs or other visual recordings unjustifiably interferes with that person's reasonable expectation of privacy.

Commentary

Unauthorized visual recording is criminalized because it represents a substantial and unjustified intrusion into the privacy of an individual, a right that is discussed in the commentary to Article 109. In Article 111, the act criminalized is unjustifiable interference with another person's privacy through the taking of photographs or other visual recordings of a person or his or her premises or at his or her dwelling. Article 111 also criminalizes the related offenses of transmitting or presenting unauthorized photographs or recordings, thereby allowing a third person to see them. The question of whether there has been unjustifiable interference with another person's privacy is one for judicial interpretation. For example, if a person has a particularly high public profile (e.g., a nationally known politician), he or she may have a lesser expectation of privacy than an "ordinary" person. Therefore, what may qualify as an unjustifiable interference in the case of an ordinary person might not qualify in the case of a public figure. Different considerations will also apply in public and private situations; a person obviously has a lesser expectation of privacy when he or she is in public.

Unauthorized visual recording is an offense that may be perpetrated by either a public official or an individual. The use of the term "a lawful authorization" is pertinent to the recording of persons or premises by police officers. Under the MCCP, which deals with covert and other measures of surveillance, visual recording of a person or premises is permissible in certain circumstances. If a police officer is following the provisions of the MCCP, he or she is not unlawfully interfering with a person's privacy.

Article 111.2: Penalty

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

Article 112: Violation of the Privacy and Confidentiality of Communications

Article 112.1: Definition of Offense

1. A person commits the criminal offense of violation of the privacy and confidentiality of communications when he or she, without lawful authorization, justification, or the consent of the persons party to the communication:
   (a) by the use of technical means intercepts, eavesdrops, accesses, records, opens, stores, destroys, or otherwise infringes privacy and confidentiality of communications;
   (b) opens a sealed communication or by the use of chemical agents or technical means obtains knowledge of the content of a sealed communication not addressed to him or her;
   (c) transmits or delivers the content of a private or confidential communication to a third person or otherwise intentionally enables a third person to obtain knowledge of the content of such communications.
2. For the purposes of Article 112, communications includes:
   (a) verbal communications;
   (b) letters;
   (c) telegrams;
   (d) facsimiles;
   (e) sealed packages;
   (f) telephone communications; and
   (g) other communications conducted by computer networks and other means of information technology.
3. For the purposes of Article 112, confidentiality and privacy of communications conducted over telephone, computer network, and other means of information technology encompasses:
   (a) the contents of communication; and
   (b) traffic data, including location data.

Commentary

The violation of the privacy and confidentiality of communications is criminalized because it represents a substantial and unjustified intrusion into the privacy of an individual. The right to privacy is discussed in greater detail above under Article 109.

Chapter 8, Part 3, Section 5, of the MCCP, which deals with covert and other technical measures of surveillance or investigation, limits a person's right to privacy by allowing the interception of communications in certain circumstances. When a policing official follows the provision of the MCCP, this represents a lawful justification as discussed in Article 112. However, if the officer exceeds or does not follow the provisions laid out in the MCCP, this is an unauthorized and unlawful violation of the person's right to privacy and may be prosecuted a criminal offense under Article 112.

Article 112 also applies to individuals other than policing officials.

Paragraph 3: For a discussion of the meaning of traffic data, reference may be made to the Explanatory Report to the Convention on Cybercrime, paragraphs 28–31. Location data is included in the definition of traffic data.

Article 112.2: Penalty

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

Article 113: Abuse of Personal Data

Article 113.1: Definition of Offense

A person commits the criminal offense of abuse of personal data when he or she without authorization accesses stored personal data for himself or herself or another person, which was not intended for him or her and is protected against unauthorized access.

Commentary

Abuse of personal data is criminalized because it represents a substantial and unjustified intrusion into the privacy of an individual. The right to privacy is discussed in greater detail above under Article 109. This offense applies to all persons, including public officials and policing officials. Article 113 should be read in light of domestic legislation that regulates the use and access of personal data.

Article 113.2: Penalty

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

Article 114: Abuse of Personal Secrets

Article 114.1: Definition of Offense

A person commits the criminal offense of abuse of personal secrets when he or she discloses a secret of another person, in particular, a secret that belongs to the realm of personal privacy or a business or trade secret, which was confided to or otherwise made known to him or her in his capacity as a:

(a) doctor, dentist, psychologist, psychiatrist, veterinarian, pharmacist, or member of another medical profession;

(b) lawyer;

(c) marriage or family counselor as well as counselor in matters of addiction;

(d) social worker; or

(e) public official.

Article 114.2: Penalty

1. The applicable penalty range for the criminal offense of abuse of personal secrets is one to five years' imprisonment.

2. The court may impose a fine, as an alternative principal penalty, upon a person convicted of abuse of personal secrets.