

Section 6: Property Offenses

General Commentary

This section contains property offenses, the majority of which are contained in almost all states, although with varying classifications and some variety in the elements of the criminal offenses. The section was drafted after a comparative survey of penal codes from a variety of legal traditions.

Article 119: Theft

Article 119.1: Definition of Offense

1. A person commits the criminal offense of theft when he or she unlawfully appropriates property belonging to another, with the intention of depriving the other person of it.
2. For the purpose of Article 119, *property* means:
 - (a) movable property, whether tangible or intangible; and
 - (b) immovable, intangible property.

Commentary

Paragraph 1: The offense of theft is often defined as larceny in many penal codes, but the two terms are synonymous. In some systems, primarily those using the old common law doctrine on larceny, the intention element required is the intention to *permanently* deprive a person of his or her property, meaning that something like taking a car for the purpose of joyriding is not considered theft. This intention element has not been followed in the MCC. Thus joyriding could fall within the scope of theft under Article 119. Otherwise, a separate offense of joyriding, theft of a motor vehicle, or taking a motor vehicle without consent would have to be included in the penal code.

Paragraph 2: The definition of property contained in Article 1(8) of the MCC does not apply to the criminal offense of theft under Article 119. This is because the definition in Article 1(8) is too broad for the purposes of theft and many of the other property-related offenses contained in Section 6. As is general practice in many states around the world, property offenses do not apply to certain types of property, for example, immovable property. A definition of property that is specific to the criminal offenses of theft, robbery, aggravated robbery, receiving and concealing stolen goods, extortion, bringing into the state property obtained through crime, fraud, and criminal damage has been drafted and integrated into these provisions. Reference should be made to the commentary to Paragraphs 2(a) and 2(b).

Paragraph 2(a): Movable property is property that is capable of being moved or displaced. Tangible property is property that is detectable with the senses, such as a painting or jewelry, as opposed to intangible property that cannot be detected with the senses. Paintings and jewelry are both tangible and movable and are capable of being objects of theft. Intangible objects that are movable also fall under the definition of property. Examples include light, heat, and electricity. Some definitions of theft in domestic laws do not cover intangible movable property but create a separate offense dealing with actions similar to theft of intangible movable property. Instead of drafting two separate offenses, the drafters of the MCC combined both such offenses into the offense of theft.

Paragraph 2(b): The general rule in most systems is that immovable property—for example, land and buildings—cannot be the subject of theft, except where something forming part of the land is severed from it and unlawfully appropriated, thereby being converted from immovable to movable property (for example, when an apple is plucked from a tree on a property, it becomes movable property, and thus the act of removal falls under the ambit of theft). An exception to this general rule is contained in Article 119.1(2)(b), where the immovable property is intangible. In this case, it is included under the definition of property for the purpose of the criminal offense of theft. An example of intangible, immovable property is credit in a bank account or claims to property, which can be the subject of theft under the MCC.

Another exception to the general rule that is often integrated into legislation on the noninclusion of tangible, immovable property in the offense of theft is where a trustee or personal representative with power to sell or transfer tangible, immovable property, such as land, appropriates the property in breach of trust or other duties. Drafters of the offense of theft may wish to consider including this exception in new legislation. It has not been included in the MCC. Alternatively, drafters could consider a separate criminal offense of abuse of authorization or breach of trust with the intent to acquire property for oneself or a third party. This offense would have to be drafted in light of the laws on trusts and personal representation in the state concerned.

Article 119.2: Penalty

1. The applicable penalty range for the criminal offense of theft is one to five years' imprisonment.
2. The applicable penalty range for the criminal offense of theft is two to ten years' imprisonment when the theft is of property of high value.
3. The court may impose a fine, as an alternative principal penalty, upon a person convicted of theft where the applicable penalty range is one to five years' imprisonment.

Commentary

Paragraph 2: When deciding upon an appropriate penalty range for the criminal offense of theft, the drafters thought it was preferable to provide two different ranges, depending on the value of the goods stolen. Ordinarily, domestic legislation would include a defined amount, above which a person would be liable for a higher penalty range. The drafters of the MCC did not include a defined amount of money to differentiate between the applicable penalty ranges for theft. Instead, the term *high value* was used to differentiate between the applicable penalty ranges. If a state incorporates this provision into its criminal legislation, it should define *high value* in terms of its domestic currency.

Article 120: Robbery and Aggravated Robbery

Article 120.1: Definition of Offense

1. A person commits the criminal offense of robbery when he or she commits theft by force or threat of force.
2. A person commits the criminal offense of aggravated robbery when he or she:
 - (a) commits any robbery in company with one or more other persons; or
 - (b) commits any robbery and at the time has a firearm, an imitation firearm, or an offensive weapon with him or her.

3. For the purposes of Article 120:
 - (a) *firearm* means any portable barreled weapon that expels, is designed to expel, or may be readily converted to expel a shot, bullet, or projectile by the action of an explosive;
 - (b) *imitation firearm* means any object that has the appearance of a firearm and that could reasonably be mistaken for a firearm; and
 - (c) *offensive weapon* means:
 - (i) any article that has a blade or sharp point; or
 - (ii) any other article made or adapted for causing injury to or incapacitating a person, or intended by the person having it with him or her for such use or for threatening such use.

Commentary

Paragraph 1 and Paragraph 2: Reference should be made to the elements of the criminal offense of theft in Article 119 and its accompanying commentary as the elements of theft will need to be proven for a person to be convicted of robbery or aggravated robbery.

Paragraph 3: The definition of firearm has been taken from Article 3(a) of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (2001). The two definitions contained in Paragraphs (b) and (c) were sourced from domestic legislation on aggravated robbery.

Article 120.2: Penalty

1. The applicable penalty range for the criminal offense of robbery is two to ten years' imprisonment.
2. The applicable penalty range for the criminal offense of aggravated robbery is three to fifteen years' imprisonment.

Article 121: Extortion

Article 121.1: Definition of Offense

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

- (a) with the intention of making an unlawful material gain for himself or herself or another person;
- (b) by use of force or threat of serious harm;
- (c) compels a person to do or refrain from doing an act to the detriment of his or her property or the property of another person.

Commentary

Extortion is a common crime problem in many post-conflict societies (e.g., Nepal and Kosovo). Extortion may be used during a conflict to fund conflict-related activities. It is also often used both during and after conflict by organized criminal gangs, who seek to extort money from business owners or other persons believed to be holding wealth.

Article 121.2: Penalty

1. The applicable penalty range for the criminal offense of extortion is one to five years' imprisonment.
2. The applicable penalty range for the criminal offense of extortion is two to ten years' imprisonment when the extortion relates to property of high value.
3. The court may impose a fine, as an alternative principal penalty, upon a person convicted of extortion where the applicable penalty range is one to five years' of imprisonment.

Commentary

Paragraph 2: When deciding upon an appropriate penalty range for the criminal offense of extortion, the drafters thought it was preferable to provide two different ranges, depending on the value of the goods subject to the act of extortion. Ordinarily, domestic legislation would include a defined amount, above which a person would be liable for a higher penalty range. The drafters of the MCC did not define a particular

amount of money, opting instead to use the term *high value* to differentiate between the applicable penalty ranges. If a state incorporates this provision into its criminal legislation, it should define *high value* in terms of its domestic currency.

Article 122: Burglary

Article 122.1: Definition of Offense

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

- (a) enters any building, or part of a building, without consent of the owner or lawful justification and with intent to commit a criminal offense; or
- (b) being present in any building, or part of a building, commits a criminal offense.

Commentary

In some states, the offense of burglary is defined as grand larceny.

It is worth noting that, under Paragraph (b) it is not necessary that the perpetrator entered the building, or part of the building, unlawfully or nonconsensually, as is necessary under Paragraph (a). Instead, it is sufficient that the perpetrator committed a criminal offense while lawfully or unlawfully in any building or part of a building. In Paragraph (a), the required elements include the intention to commit a criminal offense and unlawful or nonconsensual entry into a building or part of a building. There is no need in this case to prove the commission of a criminal offense.

Vehicles that are inhabitable (e.g., caravans, vessels [e.g., boats]) or other inhabited temporary movable structures may fall under the definition of building.

Article 122.2: Penalty

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

Article 123: Aggravated Burglary

Article 123.1: Definition of Offense

1. A person commits the criminal offense of aggravated burglary when he or she commits burglary, in circumstances where the perpetrator has a firearm, an imitation firearm, or an offensive weapon with him or her at the time.
2. For the purposes of Article 123:
 - (a) *firearm* has the same meaning as in Article 120.1(3)(a);
 - (b) *imitation firearm* has the same meaning as in Article 120.1(3)(b); and
 - (c) *offensive weapon* has the same meaning as in Article 120.1(3)(c).

Commentary

Paragraph 1: Reference should be made to Article 122 on burglary and its accompanying commentary.

Paragraph 2: Reference should be made to Article 120.1(3) and its accompanying commentary.

Article 123.2: Penalty

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

Article 124: Receiving and Concealing Stolen Goods

Article 124.1: Definition of Offense

1. A person commits the criminal offense of receiving or concealing stolen goods when he or she receives or conceals stolen property or property

obtained through fraud, knowing or believing the property to be stolen or obtained by fraud.

2. For the purposes of Article 124:
 - (a) *property* has the same meaning as in Article 119.1(2); and
 - (b) *fraud* has the same meaning as in Article 126.1(1).

Commentary

Reference should be made to Article 126 on fraud and Article 119.1(2) on the definition of property for the purpose of property offenses. Property is considered stolen when it was taken by way of theft, robbery, aggravated robbery, or extortion. Reference should be made to Articles 119 and 120.

Article 124.2: Penalty

1. The applicable penalty range for the criminal offense of receiving and concealing stolen goods is two to ten years' imprisonment.
2. The court may impose a fine, as an alternative principal penalty, upon a person convicted of receiving and concealing stolen goods.

Article 125: Bringing into the State Property Obtained through Crime

Article 125.1: Definition of Offense

1. A person commits the criminal offense of bringing into the state property obtained through crime when he or she brings into or has in the state anything that he or she has obtained outside the state by an act that would have been a criminal offense if it had been committed in the state.
2. For the purposes of Article 125, *property* has the same meaning as in Article 119.1(2).

Commentary

While this offense is oftentimes contained in the penal codes of states, the importance of including this criminal offense in the MCC, and the penal codes of post-conflict states, was insisted upon by practitioners who had experience in the peace operation in Kosovo, where there was an influx of stolen cars from surrounding states.

Reference should be made to Article 119.1(2) on the definition of property for the purpose of property offenses.

Article 125.2: Penalty

1. The applicable penalty range for the criminal offense of bringing into the state property obtained through crime is two to ten years' imprisonment.
2. The court may impose a fine, as an alternative principal penalty, upon a person convicted of bringing into the state property obtained through crime.

Article 126: Fraud

Article 126.1: Definition of Offense

1. A person commits the criminal offense of fraud when he or she:
 - (a) with the intention of making an unlawful material gain for himself or herself or another, or of causing loss to another;
 - (b) induces another person by deception;
 - (c) to do or refrain from doing an act to the detriment of his or her property or the property of another.
2. For the purposes of Article 126, *property* has the same meaning as in Article 119.1(2).

Commentary

In some states, the criminal offense of fraud requires that the perpetrator obtain the property of the other person through deception, with the added element of intention to permanently deprive the person of his or her property. In other states, fraud requires the total relinquishment of the victim's property to the perpetrator. The approach taken in the MCC is somewhat wider in that it requires only that the victim act or

refrain from doing an act to the detriment of property, whether belonging to him or her or someone else.

Reference should be made to Article 119.1(2) on the definition of property for the purpose of property offenses.

Article 126.2: Penalty

1. The applicable penalty range for the criminal offense of fraud is one to five years' imprisonment.
2. The applicable penalty range for the criminal offense of fraud is two to ten years' imprisonment when the fraud relates to property of high value.
3. The court may impose a fine, as an alternative principal penalty, upon a person convicted of fraud where the applicable penalty range is one to five years.

Commentary

Paragraph 2: When deciding upon an appropriate penalty range for the criminal offense of fraud, the drafters thought it was preferable to provide two different ranges, depending on the value of the goods subject to the act of fraud. Ordinarily, domestic legislation would include a defined amount, above which a person would be liable for a higher penalty range. The drafters of the MCC did not include a defined amount of money to differentiate between the applicable penalty ranges for fraud. Instead, the term *high value* was used to differentiate between the applicable penalty ranges. If a state incorporates this provision into its criminal legislation, it should define *high value* in terms of its domestic currency.

Article 127: Embezzlement of Property

Article 127.1: Definition of Offense

1. A person commits the criminal offense of embezzlement of property when he or she:
 - (a) being a person who directs or works, in any capacity, in a private-sector entity;
 - (b) in the course of economic, financial, or commercial activities;

- (c) embezzles property, private funds, or securities or any other thing of value entrusted to him or her by virtue of his or her position.
2. For the purposes of Article 127, *property* has the same meaning as in Article 1(8).

Commentary

Paragraph 1: The criminal offense of embezzlement involves the theft of property by a person who is entrusted to look after or manage this property. The wording of this section is taken from Article 22 of the United Nations Convention against Corruption. The offense of embezzlement by a public official is also contained in the MCC. Reference should be made to Article 142.

Paragraph 2: The definition of property for the purposes of embezzlement is different from the definition used for some of the other offenses in this section of the MCC because the sort of property that can be embezzled is historically much wider than the sort of property that is subject to other property offenses, such as theft. For a further discussion on the meaning of *property* for the purpose of the criminal offense of embezzlement, reference should be made to Article 1(8) and its accompanying commentary.

Article 127.2: Penalty

1. The applicable penalty range for the criminal offense of embezzlement is one to five years' imprisonment.
2. The applicable penalty range for the criminal offense of embezzlement is two to ten years' imprisonment when the embezzlement relates to property of high value.

Commentary

Paragraph 2: When deciding upon an appropriate penalty range for the criminal offense of embezzlement, the drafters thought it was preferable to provide two different ranges, depending on the value of the goods embezzled. Ordinarily, domestic legislation would include a defined amount, above which a person would be liable for a higher penalty range. The drafters of the MCC did not include a defined amount of money to differentiate between the applicable penalty ranges for embezzlement. Instead, the term *high value* was used to differentiate between the applicable penalty ranges. If a state incorporates this provision into its criminal legislation, it should define *high value* in terms of its domestic currency.

Article 128: Forgery

Article 128.1: Definition of Offense

1. A person commits the criminal offense of forgery when he or she:
 - (a) makes a false instrument with the intention that he or she or another will use it to induce another to accept it as genuine; and
 - (b) by reason of so accepting it, to obtain a gain or cause a loss.
2. For the purposes of Article 128, *instrument* means any document, of an informal or formal character, excluding counterfeit money as defined in Article 134.1(2), and includes but is not limited to any:
 - (a) disc, tape, soundtrack, or other device on or in which information is recorded or stored by mechanical, electronic, or other means;
 - (b) money orders;
 - (c) postage stamps;
 - (d) official licenses or stamps issued by [insert name of state];
 - (e) checks, including traveler's checks and bank drafts;
 - (f) credit cards, debit cards, or other charge cards;
 - (g) share certificates; and
 - (h) passports or other documents that can be used instead of a passport.

Commentary

In interpreting the meaning of *false* under Article 128.1(1)(a), the following definition of false instrument may be helpful: An instrument may be considered false for the purpose of this provision if it purports: (a) to have been made in the form in which it is made by a person who did not in fact make it in that form; (b) to have been made in the form in which it is made on the authority of a person who did not in fact authorize its making in that form; (c) to have been made in the terms in which it is made by a person who did not in fact make it in those terms; (d) to have been made in the terms in which it is made on the authority of a person who did not in fact authorize its making in those terms; (e) to have been altered in any respect by a person who did not in fact alter it in that respect; (f) to have been altered in any respect on the authority of a person who did not in fact authorize the alteration in that respect; (g) to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered; or (h) to have been made or altered

by an existing person where that person did not in fact exist. In relation to the making of a false instrument, a person should be treated as making a false instrument if he or she alters an instrument so as to make it false in any respect (whether or not it is false in some other respect apart from that alteration).

The making of money as a false instrument is excluded by the provisions of Article 128.1(2). This offense is covered in Article 134 (“Counterfeiting of Money”). Reference should be made to Article 134 and its accompanying commentary.

Where the making of false instruments is done as part of organized criminal activity, which is common in many post-conflict states, this factor may be taken into account in the determination of an appropriate penalty. See Article 44 (“Augmentation of the Maximum Period of Imprisonment When a Criminal Offense Is Committed as Part of Organized Criminal Activity”). The accused may also be charged with participation in an organized criminal gang under Article 136.

Paragraph 2: The list of instruments contained in Paragraph 2 is illustrative and not exhaustive.

Article 128.2: Penalty

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

Article 129: Using False Instruments

Article 129.1: Definition of Offense

1. A person commits the criminal offense of using false instruments when he or she uses a false instrument, knowing that it is false:
 - (a) with the intention to induce another to accept it as genuine; and
 - (b) by reason of so accepting it, to obtain a gain or cause a loss.
2. For the purposes of Article 129, *instrument* has the same meaning as in Article 128.1(2).

Commentary

Reference should be made to the commentary accompanying Article 128, above.

Article 129.2: Penalty

1. The applicable penalty range for the criminal offense of using false instruments is two to ten years' imprisonment.
2. The court may impose a fine, as an alternative principal penalty, upon a person convicted of using false instruments.

Article 130: Possessing False Instruments

Article 130.1: Definition of Offense

1. A person commits the criminal offense of possession of false instruments when he or she has in his or her possession a false instrument, knowing that it is false:
 - (a) with the intention that that person or another will use it to induce another to accept it as genuine; and
 - (b) by reason of so accepting it, to obtain a gain or cause a loss.
2. For the purposes of Article 130, *instrument* has the same meaning as in Article 128.1(2).

Commentary

Reference should be made to the commentary accompanying Article 128, above.

Article 130.2: Penalty

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

Article 131: Arson

Article 131.1: Definition of Offense

1. A person commits the criminal offense of arson when he or she starts a fire or causes an explosion with the purpose of destroying a building or occupied structure of another person.
2. For the purposes of Article 131, *occupied structure* means any structure, vehicle, or place adapted for overnight accommodation of persons, or for carrying on business, whether or not a person is actually present.

Commentary

In some states the criminal offense of arson is treated as a form of aggravated criminal damage. A definition of criminal damage is provided in Article 133 of the MCC. Definitions of aggravated criminal damage involve damage to property through fire, coupled with the intention of the perpetrator to endanger life or to be reckless in endangering life. Some other states include the endangerment of bodily safety as well as endangerment to life as aggravating features in the definition of criminal damage. Under the legislation of these states, aggravated criminal damage can be committed against all types of tangible property. Another approach is to define arson as an offense that can be committed against all types of property and where the focus of the provision is on the endangerment of life.

Instead of following the above approaches, the drafters of the MCC decided to draft a criminal offense based on the traditional definition of arson and another accompanying provision on recklessly burning or exploding. In Article 131, on arson, the focus of the criminal offense is on the destruction of a building or occupied structure by a person wishing to destroy that building or structure. Traditionally, arson could be committed only on a building or occupied structure. In addition, the requisite intention for the criminal offense of arson was not to endanger life but instead to destroy the building or occupied structure. A further offense of recklessly burning or exploding is contained under Article 132. Article 132 focuses more on the danger to life, body, and property and does not require the intention to destroy the building or occupied structure. Reference should be made to Article 132 and its accompanying commentary.

The criminal offense of arson has been prevalent in post-conflict states, particularly after interethnic conflicts. After a conflict, certain ethnic groups have been punished, or retribution has been sought, through the commission of arson.

Paragraph 2: Instead of listing the different types of buildings and structures that may be the subject of arson, the drafters decided to include a broad definition that focuses on buildings or structures used for the purpose of either habitation or business.

Article 131.2: Penalty

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

Article 132: Reckless Burning or Exploding

Article 132.1: Definition of Offense

1. A person commits the criminal offense of reckless burning or exploding when he or she intentionally starts a fire or causes an explosion, whether on his or her own property or on another's, and thereby recklessly:
 - (a) places another person in danger of death or bodily injury; or
 - (b) places a building or occupied structure of another person in danger of damage or destruction.
2. For the purposes of Article 132, *occupied structure* has the same meaning as in Article 131.1(2).

Commentary

Unlike the criminal offense of arson under Article 131, the criminal offense of reckless burning or exploding does not require the intention to destroy the building or occupied structure. It focuses more on the danger to life, body, or property.

Damage to property is quite common in the aftermath of interethnic conflict. Members of one ethnic group may damage the homes of the members of a different group with the intention, not of destroying the homes, but of scaring their residents into leaving the area. Such conduct falls under the criminal offense not of arson but of reckless burning or exploding.

Paragraph 2: Reference should be made to the commentary to Article 131.1(2).

Article 132.2: Penalty

The applicable penalty range for the criminal offense of reckless burning or exploding is two to ten years' imprisonment.

Article 133: Criminal Damage

Article 133.1: Definition of Offense

1. A person commits the criminal offense of criminal damage when he or she unlawfully destroys or damages any property belonging to another.
2. For the purposes of Article 133, *property* means tangible property, whether movable or immovable.

Commentary

Paragraph 1: The level of damage or destruction required to prosecute a person for criminal damage is ordinarily more than nominal damage, but it does not have to be irreversible damage.

Paragraph 2: Reference should be made to the commentary to Article 119.1(2), which discusses movable, immovable, and tangible property. In contrast to the definition of property under Article 119 ("Theft"), which precludes the theft of immovable tangible property, the offense of criminal damage can be committed against tangible, immovable property (e.g., land and buildings), as well as tangible, movable property (e.g., personal items). Therefore, acts such as spraying graffiti on the walls of buildings or damaging the land of another (e.g., by dumping garbage that costs a lot to remove) would be included under the criminal offense of criminal damage.

Article 133.2: Penalty

1. The applicable penalty range for the criminal offense of criminal damage is one to five years' imprisonment.
2. The applicable penalty range for the criminal offense of criminal damage is two to ten years' imprisonment when the criminal damage relates to property of high value.

3. The court may impose a fine, as a principal penalty, upon a person convicted of criminal damage where the applicable penalty range is one to five years' imprisonment.

Commentary

Paragraph 2: When deciding upon an appropriate penalty range for the criminal offense of criminal damage, the drafters thought it was preferable to provide two different ranges, depending on the value of the goods damaged. Ordinarily, domestic legislation would include a defined amount, above which a person would be liable for a higher penalty range. The drafters of the MCC did not include a defined amount of money to differentiate between the applicable penalty ranges for criminal damage. Instead, the term *high value* was used to differentiate between the applicable penalty ranges. If a state incorporates this provision into its criminal legislation, it should define *high value* in terms of its domestic currency.