

# Section 9: Justification and Exclusion of Criminal Responsibility

## General Commentary

As articulated in Article 16, a person can be held criminally responsible only if he or she commits a criminal offense with intention, recklessness, or negligence. Even if a person has committed the physical element of a criminal offense with the requisite intention, recklessness, or negligence, he or she may still evade criminal responsibility if there is either a lawful justification for the commission of the criminal offense or a ground excluding criminal responsibility. Reference should be made to Article 16 and its accompanying commentary.

Both “lawful justification” and “exclusion of criminal responsibility” fall under the broad rubric of what are commonly known as defenses. However, there is a philosophical and practical distinction between these terms. Justification defenses are those where what was clearly criminal conduct is deemed not to be so because the circumstances make the conduct socially acceptable in some way. Exactly what is classified as a “lawful justification” is a policy decision for a state, although most states, irrespective of their particular legal traditions, seem to adopt similar classifications.

Defenses that fall under the category of “excuse” or “exclusion of criminal responsibility” excuse a person from moral blame even where his or her conduct was criminal. Criminal responsibility may be excluded where the person’s behavior is not voluntary (e.g., under duress) or where the person lacked capacity (e.g., in the case of insanity). As with justification defenses, deciphering what is included under “exclusion of criminal responsibility” is a matter of public policy for a state. For example, states that allow criminal responsibility to be excluded on the basis of intoxication commonly preclude the use of this defense where a person has become voluntarily intoxicated, as it is well known that intoxication can impede a person’s judgment.

In some legal systems, “partial defenses” may operate with respect to certain criminal offenses. A partial defense will not completely exonerate a person from criminal responsibility but it may serve to reduce the offense and any applicable penalty. For example, in the case of murder, the presence of provocation may reduce the charge to that of manslaughter or voluntary homicide. The defense of diminished responsibility

is also relevant in some systems in the same way. There are no partial defenses contained in the MCC. Where provocation or diminished responsibility is present, it is listed as a mitigating factor that should be taken into account in determining the applicable penalty to impose upon a convicted person under Article 51(1)(a). Some systems also categorize “automatism” as a defense that excludes criminal responsibility, as the person’s behavior is not voluntary. *Automatism* means that a person who has perpetrated a criminal offense may have done so while subject to the total absence of voluntary control over his or her actions (where the person is in a hypnotic trance, for example) and where he or she did not voluntarily induce this state. In the MCC, automatism is not covered under “defenses” but instead is treated as an aspect of volition, going to the voluntariness of the perpetrator’s conduct. Article 17(1) provides that a criminal offense can be committed only by a “voluntary” act. Reference should be made to Article 17 and its accompanying commentary.

In many systems, infancy is also treated as an excuse defense to a criminal offense. In the MCC, the issue of infancy is dealt with under Article 7(3). Reference should be made to Article 7, “Personal Jurisdiction,” and its accompanying commentary. Finally, in yet other systems, alibi is also conceived of as a defense. Alibi is not treated as such in the MCC. The accused person is not asserting that he or she committed the criminal offense and seeking a justification or to be excused from his or her conduct. Instead, he or she is asserting that he or she did not commit the conduct alleged in the first place. The alibi should be considered when the court is examining whether the person committed the criminal offense, either directly or through a form of participation. Reference should be made to the commentary to Article 17.

All the defenses contained in the Rome Statute of the International Criminal Court are contained in the provisions of the MCC. The statute also contains a provision, Article 31(3), that provides for the introduction of additional defenses relevant to the crimes within the International Criminal Court’s jurisdiction. These defenses (e.g., military necessity, consent, and reprisal) mostly exist under international humanitarian law and would be relevant to war crimes prosecutions. A post-conflict state that is trying a war crimes case should be aware of this fact.

The provisions of the Rome Statute of the International Criminal Court were used as the basis of the MCC defenses, but they were not used in their totality. Any deviation in wording and substance will be discussed under the relevant provision.

When a post-conflict state is considering the reform of its criminal law as it relates to defenses, it not only may consider adding specific defenses but may also need to consider removing some defenses. For example, it is common to find the defense of honor killings in some systems. There has been widespread opposition to such a defense and states have been urged not to apply this defense in domestic criminal law.

# Section 9

## Subsection 1: Justification

### Article 20: Self-Defense

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1. An act committed in self-defense is not a criminal act.
2. Self-defense is an act that is necessary to avert an imminent and unlawful attack against a person or his or her property or against another person or the property of that other person.
3. The harm caused by the act of self-defense must not be grossly disproportionate to the interest it sought to protect.
4. Justification on account of self-defense based on defense of property does not apply with the criminal offenses of genocide (Article 86) and crimes against humanity (Article 87).
5. Self-defense based on defense of property may be raised only in relation to war crimes (Article 88) when the property is essential for the survival of the person or another person, or is essential for the survival of a military mission. The fact that the person was involved in a defensive operation conducted by forces may not in itself constitute a ground for excluding criminal responsibility under this article.

### Commentary

Notwithstanding the fact that a person has perpetrated a criminal offense, he or she may rely on the justification of self-defense to exempt himself or herself from criminal responsibility. In the case of an imminent attack, a person is given wide powers to respond to this attack. Self-defense is expressed in different ways in different states. For example, in some states, it is permissible to use lethal force to protect property, while in others this is impermissible. It is up to each individual state to define the exact parameters of this defense.

Integral to the particular articulation of self-defense in the MCC is the requirement that the attack to be defended against is both “imminent” and “unlawful.” There cannot be a substantial break of time between the act defended against and the act of self-defense. As for the term *unlawful*, if a police officer is conducting a lawful arrest, for example, a person cannot use force to resist and then claim self-defense to the charge of assault. The act of self-defense must also be “necessary,” meaning that a person possessed no alternative means with which to defend himself or herself.

The interests a person can protect by means of self-defense are his or her person and property and the person and property of another. In some states, it is impermissible to use self-defense in defense of property (see also the discussion on defense of property with regard to international offenses, below). In the context of a post-conflict state, where there may be no fully functioning police force to protect a person’s property, the drafters thought it was important to include this ground of liability, tempered by the “proportionality” restriction articulated in Paragraph 3. Paragraph 3 sets out the principle that the harm or force used by the person acting in self-defense must be proportionate to this interest. This means it would be disproportionate to use a great degree of force against someone for stealing a chicken when you have a chicken farm. However, if a person sought to protect a chicken that was the sole source of food for his or her family, a greater degree of force might be permissible.

**Paragraphs 4 and 5:** These paragraphs follow the wording of Article 31(1)(c) of the Statute of the International Criminal Court, which deals with self-defense vis-à-vis the criminal offenses of genocide, crimes against humanity, and war crimes. The provision declares that a person cannot act in defense of property, except with regard to war crimes and where the property is “essential for the survival of the person, or another person or property which is essential for the accomplishment of a military mission.” It also states that “the fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this Article.” It should be noted that many legal commentators have objected to the inclusion of a defense of property with regard to war crimes, and one state, Belgium, has formulated a declaration objecting to it. The drafters of the MCC decided to follow the position adopted in the Statute of the International Criminal Court; however, a state may wish to deviate from this position and to exclude completely defense of property as a defense to war crimes.

## Article 21: Necessity

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1. An act committed by necessity is not a criminal act.
2. Necessity is an act that is necessary to avert an imminent danger to life, property, or other protected interests.
3. The harm caused by averting the danger must not be disproportionate to the interest it sought to protect.

## Commentary

Justification on account of necessity is relevant where a person commits a criminal offense to prevent a greater evil. In some states, the defense of necessity is seen as closely related to the defense of duress, set out in Article 25 more specifically as “duress by circumstances” (as opposed to the second category of duress, “duress by threats”). Under the MCC, necessity is categorized as a justification defense, and duress is categorized as an “exclusion of criminal responsibility” defense, because the designation of necessity is a matter of public policy, while duress is deemed an involuntary action on the part of the perpetrator.

For a person to qualify under the defense of necessity in relation to his or her criminal conduct, the following must be present: (1) a danger to life, property, or other interests; (2) the danger is imminent; (3) an act was undertaken to avert the danger; and (4) the harm caused by averting the danger was not disproportionate to the protected interest. In the case of necessity, the protected interests are life, property, and “other protected interests.” The meaning of *other protected interests* is one for judicial interpretation. It is again really a matter of state policy. Any “other protected interests” that are deemed allowable by the court should be important enough to merit inclusion under the justification defense of necessity.

Article 31 of the Rome Statute of the International Criminal Court merges both the defense of necessity and the defense of duress under Paragraph 1(d), treating necessity like a category of duress—duress by circumstances. As mentioned above, the MCC has not followed this position. Despite the distinction in how necessity is categorized, the substance of the defense of necessity contained in the statute is covered in Article 21 of the MCC.

## Article 22: Superior Orders

1. An act committed under an order of a government or of a superior, whether military, security service, law enforcement, or civilian, is not a criminal act, where:
  - (a) the person was under a legal obligation to obey orders of the government or the superior in question;
  - (b) the person did not know that the order was unlawful; and
  - (c) the order was not manifestly unlawful.
2. Orders to commit genocide, crimes against humanity, torture, and enforced disappearances are manifestly unlawful.

## Commentary

The wording of Article 22 is taken from Article 33 of the Rome Statute of the International Criminal Court. Article 33 applies only to genocide, crimes against humanity, and war crimes, as these are the offenses currently within the jurisdictional reach of the International Criminal Court.

The defense of superior orders takes into account the fact that persons in a superior-subordinate relationship may be ordered to undertake certain actions, which they are expected to obey. The duty to obey, however, cannot be held to absolve a person of all liability when he or she commits a criminal offense. In some states—and under the statutes of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone—superior orders are viewed as a mitigating factor in the determination of penalties only, rather than as a defense. In contrast, when the requirements of Article 22 are met, superior orders operate as a full defense to the commission of a criminal offense.

To comply with Article 22, it must first be established that a superior-subordinate relationship exists, whether it is military or civilian in nature. Second, it must be proved that the person did not know that the order was unlawful. This requirement may be relevant in only a small number of cases and is probably most pertinent in relation to the area of war crimes, where parts of international humanitarian law, upon which many of the war crimes provisions are based, can be either unclear or controversial. Third, in the case of certain defined “manifestly unlawful orders,” a person may not invoke the defense and claim he or she did not know the order. Orders to commit genocide and crimes against humanity are defined as such in Article 33(2) of the Statute of the International Criminal Court. It is noteworthy that war crimes were excluded from the scope of Article 33(2) for the reasons mentioned previously. Paragraph 2, above, broadens the scope of the provision in the convention, adding torture and enforced disappearances to the list. The addition of torture is required by Article 2(3) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The addition of enforced disappearance is in accordance with Article 6 of the United Nations Principles on the Protection of All Persons from Enforced Disappearances and in the United Nations Convention on Enforced Disappearances.

## Section 9

### Subsection 2: Exclusion of Criminal Responsibility

#### Article 23: Mental Incompetence

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1. Criminal responsibility is excluded when a mentally incompetent person commits a criminal offense.
2. A person is mentally incompetent when, at the time of committing the criminal offense, he or she suffers from a mental disease or defect that destroys his or her capacity to appreciate the unlawfulness or nature of his or her conduct, or destroys his or her capacity to control his or her conduct to conform with the requirements of the law.

#### Commentary

The presence of mental incompetence in the perpetrator of a criminal offense means that he or she is not considered morally blameworthy due to a lack of capacity. Therefore the person can benefit from the defense set out in Article 23. The MCC uses the term *mental incompetence* in describing a defense that is often referred to as an insanity defense in domestic criminal legislation. The precise wording of Paragraph 2 is taken from Article 31(1)(a) of the Rome Statute of the International Criminal Court, which is consistent with the principles on the defense of mental incompetence in most legal systems. In essence, Article 31 replicates what have been commonly called the M’Naughton Rules in many legal systems (after the original case that elaborated the principles applicable to the defense of insanity in English common law).

To avail of the defense of mental incompetence, the following must exist: (1) that the person had a “mental disease or defect”; and (2) this defect destroyed his or her capacity to (a) appreciate the unlawfulness of his or her conduct; or (b) appreciate the nature of his or her conduct (i.e., not understand the physical nature and quality of his or her act); or (c) control his or her conduct to conform with the law. The latter ground

should not be confused with “diminished responsibility,” which is a partial defense to the charge of murder in some states (see the general commentary to Section 9, above). Diminished responsibility involves not the “destruction” of a person’s capacity but rather the diminution of it through an abnormality of mind that substantially impairs his or her mental responsibility for his or her acts. Diminished responsibility may be a mitigating factor in determining a penalty under the MCC, but it cannot be a defense. Reference should be made to Article 51(1)(a) and its accompanying commentary.

For the defense to succeed, the person must be mentally incompetent at the time the criminal offense is committed. The fact that the person suffers from mental incompetence at the time of the trial does not establish that he or she was in that state when the offense was committed, although it definitely has a bearing on the person’s fitness to stand trial. Reference should be made to Chapter 7, Part 3, of the MCCP, which also sets out the applicable procedure to be followed when a person claims mental incompetence.

In some systems, when a person is found eligible to benefit from the defense of mental incompetence, a verdict of “not guilty by reason of insanity” is declared, and rather than being set free, the person may, if appropriate, be detained for psychiatric care. This is a matter for a state to determine and is, of course, contingent on adequate facilities, which are often lacking in post-conflict states. Also often lacking in post-conflict states are medical experts who can interview and ascertain whether a person is mentally incompetent and later testify in court on this issue. Many experts who had worked in the criminal justice system in post-conflict states pointed out the need to ensure that arrangements are made to access medical experts in trials where a person’s mental competency to commit a criminal offense is at issue. This factor should be taken into account for the effective implementation and application of Article 23.

## Article 24: Intoxication

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1. Criminal responsibility is excluded when a person commits a criminal offense while intoxicated and where the intoxication destroys his or her capacity to appreciate the unlawfulness or nature of his or her conduct or destroys his or her capacity to control his or her conduct to conform to the requirements of law.
2. Criminal responsibility is not excluded on account of intoxication when a person has become voluntarily intoxicated under such circumstances that he or she knew or disregarded the risk that as a result of the intoxication, he or she was likely to engage in such conduct.

## Commentary

Intoxication of the perpetrator of a criminal offense means that he or she is not considered morally blameworthy due to a lack of capacity, and therefore the person can benefit from the defense set out in Article 24. The wording of Paragraph 1 is taken from Article 31(1)(a) of the Rome Statute of the International Criminal Court. Intoxication refers to intoxication from alcohol, drugs, or other intoxicants. Where it is proven that the intoxicant destroyed a person's capacity to (1) appreciate the unlawfulness of his or her conduct; (2) appreciate the nature of his or her conduct (i.e., not understand the physical nature and quality of his or her act); or (3) control his or her conduct to conform to the requirements of law, the person may avail of the defense of intoxication. The defense is directed primarily at the phenomenon of involuntary intoxication. In the case of voluntary intoxication, a person cannot avail of the defense of intoxication where he or she knew or disregarded a risk that, by reason of taking the intoxicant, he or she was likely to engage in criminal behavior. The typical case would be a person drinking alcohol to gain the courage to subsequently perpetrate a criminal offense.

## Article 25: Duress

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1. Criminal responsibility is excluded when a person commits a criminal offense under duress.
2. A person is deemed to act under duress when the person, faced with an imminent danger to life, limb, or freedom that cannot otherwise be averted, commits an unlawful act to avert the danger away from himself or herself, a relative, or a person close to himself or herself.

## Commentary

As mentioned in the commentary to Article 21, duress and necessity are similar defenses. For the reasons mentioned under Article 21, necessity is classified as a justification defense, and duress as an exclusion of criminal responsibility defense. Duress involves a situation where the threat of imminent danger to life, limb, and freedom is so great as to overbear the will of a person, who then commits a criminal offense to avert the danger away from himself or herself, a relative, or a person close to himself or herself. This defense has been described as a concession to human frailty, allowing the excusal of criminal responsibility based on the fact that the perpetrator of the criminal act under duress does not have the capacity to form a “guilty mind” and fulfill the mens rea element of the offense. It is important in assessing whether duress was present to look at whether the person who committed the criminal offense had any other

means to counteract the “imminent danger,” the question being, Was his or her response reasonable and proportionate?

Article 31 of the Rome Statute of the International Criminal Court merges both the defense of necessity and the defense of duress under Paragraph 1(d). The substance of the defense of duress contained in the statute is covered in Articles 21 and 25 of the MCC.

## Article 26: Mistake of Fact and Mistake of Law

1. Criminal responsibility is excluded when a person commits a criminal offense under a mistake of fact.
2. A person acts under a mistake of fact when he or she mistakenly and honestly believes that circumstances exist that, if they are true, justify his or her conduct.
3. A person who was in error as to his or her mistake of fact due to negligence will be held liable for a criminal offense where the offense may be committed by negligence.
4. A mistake of law does not exclude criminal responsibility.

### Commentary

**Paragraphs 1 and 2:** Mistake of fact is recognized as an excuse to the commission of a criminal offense in most jurisdictions. A mistake of fact negates a person’s intention to commit a criminal offense, and therefore it is deemed an excuse. This idea is expressly recognized in the formulation of “mistake of fact” under the Rome Statute of the International Criminal Court, Article 32(1). Even though the MCC contains different wording than the statute, the crux of Article 32(1) is contained in Article 26, above. In most systems, the law holds that the mistake of fact must be an “honest” mistake as to circumstances that justify the conduct, were they to exist. Domestic courts generally judge the validity of the mistaken belief on objective grounds.

**Paragraph 3:** As discussed above, mistake of fact negates the intention to commit a criminal offense. Mistake of fact therefore cannot apply to offenses that may be committed negligently, as negligent conduct does not involve any element of cognition or awareness on the part of the perpetrator: the perpetrator cannot be mistaken about a fact, as he or she never considered it in the first place. As articulated in Article 18(3), a person may not be held liable for a criminal offense through negligence unless it is

specified in the MCC. Only certain offenses fall into this category, but when they do, the defense of mistake of fact cannot be invoked. Consequently, as stated in Paragraph 3, a person may be held criminally liable for this negligent offense irrespective of a mistake of fact.

**Paragraph 4:** Mistake of fact, as mentioned above, negates the intent of the perpetrator. Distinct from mistake of fact, mistake of law excludes culpability and not intent. When a person acts under a mistake of law, he or she is aware of all the circumstances surrounding his or her conduct but is operating under the mistaken belief that his or her conduct is legal. Legal systems differ about whether a mistake of law constitutes a defense to the commission of a criminal offense. Some systems, based on public policy grounds, abide by the maxim “ignorance of the law is no defense.” In other systems, a mistake of law is a permissible defense in certain circumstances, for example, where the mistake was unavoidable, or where the person who committed the criminal offense can prove that he or she had a justification for the mistake of law. In systems that allow for a mistake of law, there is a very high threshold to prove the defense, and it is rarely invoked in practice. The defense of mistake of law is not included in the MCC.