

# Section 12: Penalties

## General Commentary

The manner in which criminal penalties are determined varies greatly among different legal traditions. Even states that share the same legal tradition often have different means for determining criminal penalties. Indeed, even states that are part of the same federal system sometimes vary in how they determine penalties. Given such disparities, it was impossible for the drafters of the MCC to determine what is generally agreed-upon practice, or even best practice, in the determination of penalties. Thus the MCC provides its own penalties framework, one that is influenced by the practices in many different states and legal traditions but that is unique.

Many legal systems allow for a great deal of discretion in the determination of penalties. Some of these systems articulate the purposes of penalties in criminal legislation as a judicial starting point. In some but not all cases, maximum penalties (but not minimum penalties) are set for individual criminal offenses. In these systems, legislation may also provide for the development of sentencing guidelines by certain bodies established by law for this purpose. Often a sentencing commission is formed to create sentencing guidelines and then to collect and distribute empirical data on penalties to assist judges in the determination of penalties. Sentencing guidelines can be either binding or nonbinding. A typical sentencing guidelines system works in the following way: Sentencing guidelines create a presumptive sentence that is calculated by recourse to a matrix. On one axis of the matrix is the particular offense, graded according to its severity. On the other axis of the matrix is the “criminal history score” of the convicted person. Various aggravating factors, such as whether the convicted person has a criminal record, whether he or she used a firearm in commission of the offense, and whether the victim was seriously injured, are added together to create an overall score. Once the aggravating factors have been added up, the point where the criminal history score meets the particular offense of which the person has been convicted is plotted on a graph. This point is called the presumptive sentence and can be departed from only under “substantial and compelling circumstances.” Some commentators argue that the merits of this system are that it is specific but not too rigid. Other commentators, however, argue that sentencing guidelines infringe upon judicial discretion and interfere with the judge’s role as arbiter of penalties.

Some legal systems, in contrast, neither articulate the purposes of penalties nor set maximum penalties for all offenses. In addition, sentencing guidelines are not used to guide the process of determining penalties. Judges are afforded complete discretion.

They may use compendiums of cases for guidance, looking to particular penalties assigned by other judges in similar cases. A somewhat related method of determining penalties works on the premise of “starting points,” “pathfinders,” or “informed judicial discretion.” This method requires the creation of a database of past sentencing practice that identifies the most important elements in sentencing. This database is a starting point for judges to work from in determining appropriate penalties.

In some systems, the legislature sets down a maximum penalty for the particular criminal offense. Less commonly, the legislature may set down mandatory penalties for certain criminal offenses—murder and treason, for example. Some systems are moving to abolish or limit their mandatory penalties, with opponents of mandatory penalties arguing that such penalties are arbitrary and do not allow for the judicial consideration of individual circumstances relevant to the particular convicted person or the particular criminal offense.

In sharp contrast to the aforementioned systems, some legal systems are quite rigid in their approach to the determination of penalties, allowing little if any room for judicial discretion. Under these sorts of systems, there is very little individualization of the penalty according to the particular convicted person and the particular criminal offense he or she committed.

A midpoint between these approaches discussed above is an approach that has been termed *structured discretion* (see Council of Europe, *Recommendation No. R[92] 17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing*, and *Recommendations of Professor Ashworth*, document PC-R-SN [90]11 [paragraph 1]), which was submitted to the committee during the drafting of the recommendation). This approach blends consistency and flexibility, rejecting the rigid approach that might create inconsistency through treating different cases as if they were alike. Under structured discretion, clear aims of penalties are provided for in domestic legislation, as are principles on aggravating and mitigating circumstances, in addition to the requirement that a court give reasons for the particular penalty or penalties it decides to impose.

The drafters of the MCC were reticent to adopt a wholly discretionary approach to penalties for three reasons. First, post-conflict states often suffer from a dearth of legal personnel, including judges. New practitioners may be inexperienced and unfamiliar with the determination of penalties. It is therefore preferable to provide as comprehensive and prescriptive a framework as possible in the MCC. (This is not to say that the MCC contains no element of judicial discretion. This issue will be discussed in greater detail below.) Second, the public in a post-conflict society may mistrust the criminal justice system because its officials may have been involved in violations of human rights. In addition, judges may not have been independent and impartial and may have succumbed to corruption. Reinstilling the local population’s trust in the justice system requires provisions that limit judicial discretion. Third, the principle of legality comes into play in determining how penalties are dealt with. Many of the experts consulted in the course of drafting the codes were concerned that the MCC should lay down all the rules, principles, and procedures applicable to the determination of penalties, consistent with the strict principle of legality articulated in Article 3 of the MCC. There was also a concern that individual minimum and maximum penalties should be set out for the offenses contained in the Special Part of the MCC.

But the drafters were reluctant to develop an entirely inflexible system that allowed no room for judicial discretion when determining penalties. Judicial discretion is essential to individualize a penalty and provide for equality of treatment between convicted persons. Some would argue that a strict procedure applied to all persons ensures equality for all. However, the drafters took *equality* to mean that convicted persons are treated equally, meaning persons with similar aggravating and mitigating circumstances who have committed similarly serious criminal offenses should be treated similarly.

The drafters decided to adopt a form of structured discretion in which judges are guided by the following: (a) the purposes of penalties, the fundamental principle, and other principles relating to penalties; (b) a set penalty structure; and (c) a procedure for the determination of penalties. For a more detailed discussion of each of these aspects of the MCC penalty provisions, reference should be made to the provisions below and their accompanying commentaries, which give room for judicial discretion in the determination of penalties within the confines of the structured approach that has been designed.

In considering the available options for incorporating structured discretion into the MCC, the drafters decided not to adopt the quasi-discretionary sentencing guidelines because of growing criticism of these sorts of guidelines in some jurisdictions. Another reason for not using sentencing guidelines in the MCC is that many sentencing guidelines focus on imprisonment exclusively, a position that the drafters of the codes do not support for reasons that are discussed below in the commentary to Article 39. Finally, sentencing guidelines can be complicated, so the drafters of the codes opted for a more simple and straightforward approach. The idea of creating starting points or pathfinders was also rejected, given the probable lack of statistical data in a post-conflict state, as well as resource issues related to establishing a mechanism of data compilation and analysis.

Instead, specific legal provisions, rather than nonstatutory guidelines or pathfinders, have been set out in the MCC. Subsection 1 provides for the broad purposes of penalties and applicable principles that should be taken into account throughout the penalty process. Subsection 2 then sets out the penalty structure in articulating the applicable penalties under the MCC, including the fact that the MCC adopts an approach that sets out a minimum-maximum penalty for each individual criminal offense. Subsection 3 then sets out a step-by-step procedure for ascertaining the appropriate penalty. This procedure has been transferred into a diagrammatic format. Reference should be made to annex 3. Reference should also be made to Chapter 11, Part 7, of the MCCP on the determination of penalties. Penalties will be determined at a separate hearing after the trial.

## Section 12

### Subsection 1: Purposes of Penalties, Fundamental Principle, and Other Principles Relating to Penalties

#### **Article 34: Purposes of Penalties**

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The fundamental purpose of penalties is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful, and safe society by imposing just penalties that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the convicted person and other persons from committing criminal offenses;
- (c) to separate convicted persons from society, where necessary;
- (d) to assist in rehabilitating convicted persons;
- (e) to provide reparations for harm done to victims or the community; and
- (f) to promote a sense of responsibility in convicted persons and acknowledgement of the harm done to victims and to the community.

#### **Commentary**

It is essential that each state consider the purposes of criminal penalties. The essential question is: Why does the criminal justice system provide for penalties? This question is important from both a broad philosophical perspective and a practical perspective. With regard to the former, it is important that criminal penalties seek to achieve defined philosophical objectives. The imposition of penalties should be the means to a

defined end, which must be specified by law. The creation of a cohesive and coherent criminal policy should be considered, openly debated among both the legal community and the general community, and then set out in criminal legislation. This criminal policy should reflect both its specific environment of operation and application and the views of the population. It is also vital that this policy is well researched and considers progressive research and findings on criminal policy and penology from around the world. From a practical perspective, having a defined criminal policy means that judges can refer to this policy when they are considering the appropriate penalties in a particular case. This policy promotes greater equality and uniformity in judicial decision making, as judges cannot merely take into account any purposes that they themselves consider important. All judges should make reference to a uniform set of principles that are on notice to the public through their inclusion in domestic criminal legislation. While some states have not included these aims in their domestic criminal legislation, the majority of states have.

For the reasons mentioned above, it was considered appropriate to include the purposes of penalties in the MCC. The question of the appropriate purposes of penalties is a hotly debated one. The aims may be divided into two broad categories: moral grounds and utilitarian grounds. The former ground, which is retrospective in nature, aims to punish the convicted person for his or her criminal acts and to seek retribution. The latter ground, which is prospective in nature, instead looks at broad utilitarian aims such as rehabilitation, deterrence, and incapacitation (or separation of the convicted person from society to prevent him or her from committing any more criminal offenses against society). These grounds have been widely recognized in different legal systems for centuries. Another ground that dates back centuries and is not so widely recognized as a stated aim of penalties is compensation of the victim. This ground was originally recognized as integral to the redress for harm committed against a person, and as a primary purpose of dispute resolution and prevention of acts of revenge. But later, when states adopted a monopoly over redress for wrongs against individuals, it was not as widely enforced. That said, it remained a vital component of the determination of penalties in many states around the world.

A comparative survey of criminal legislation from around the world reveals many different articulations of the purposes and principles of criminal legislation, with some states focusing more on deterrence and others focusing more on retribution. Article 34 of the MCC articulates both a general purpose and specific purposes of penalties. The general purpose is to maintain “a just, peaceful, and safe society.” This provision was considered particularly apt with regard to a post-conflict state that may be emerging from years of conflict and lawlessness. Also integral to the general aim of penalty determination is the notion of just penalties. In the post-conflict era, and in the return to the rule of law, it is imperative that the concept of justice become an integral aspect of the assignment of criminal penalties. It is noteworthy that the provision refers also to other crime prevention initiatives, signaling the fact that criminal penalties alone cannot bring about the general and specific aims articulated in Article 34.

The specific objectives laid out in Article 34 contain a mixture of both moral and utilitarian purposes of penalties. The moral aim set out in Paragraph (f) is the promotion of a sense of responsibility in the convicted person for the harm done to the victim and the community. This is a slight deviation from the strong retributive language of other criminal codes, as it focuses more on accountability than retribution. Para-

graph (a) also speaks to the denouncement of unlawful conduct, which relates specifically to the convicted person (i.e., the denouncement of his or her particular conduct) and also generally to the community (i.e., a general denouncement of that particular criminal conduct). Utilitarian aims include deterrence, Paragraph (b); incapacitation, Paragraph (c); and rehabilitation, Paragraph (d). Paragraph (f) also speaks to the acknowledgment of harm done to the community. Also contained in Article 34 is another purpose aimed at victim rehabilitation, discussed above.

As mentioned above, the chief consideration in creating a policy on penalties is that it is coherent and therefore less susceptible to abuse. States, however, often do not take into account that the prescribed purposes in domestic legislation may represent competing values, particularly with regard to moral versus utilitarian grounds of punishment. If a state is to ensure that the purposes are translated into practice coherently, it needs to prioritize among those values, or at least to declare one value as paramount. For this reason, the MCC has added another layer to the purposes of penalties: the applicable principles set out in Articles 35 and 36. Article 35 prioritizes one particular purpose of penalties that is to be held paramount in the determination of penalties, namely, the just deserts principle. The just deserts principle is discussed in greater detail in the commentary to Article 35.

As mentioned above, Article 34 refers to “crime prevention initiatives” to contribute to the overall purposes set out in it. The particular penalties set out in the MCC will certainly not achieve these aims without supplementation by other crime prevention initiatives. For example, a post-conflict state requires a strong, well-staffed, and well-trained police force to protect the public and to act as the first line of defense in crime prevention. In addition to adopting crime prevention initiatives, a post-conflict state may wish to consider other means of addressing criminal behavior and consequently preventing it. A prime example, not included in the MCC but widely recommended, is restorative justice.

Restorative justice, as a means to supplement the criminal justice system or as an alternative to criminal justice prosecution, is common around the world. Some restorative justice initiatives are localized, whereas others form part of the national criminal policy and are contained in domestic criminal legislation. In some cases, restorative justice programs may run in conjunction with criminal proceedings, and their outcomes will be considered at the stage of determination of penalties. Restorative justice can be defined either in terms of the process or in terms of its outcome. The United Nations’ definition of a restorative justice program as “any programme that uses restorative processes and seeks to achieve restorative outcomes” encapsulates both these concepts (see paragraph 2, *United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, UN document E/2002/INF/2/Add.2). A restorative process is any process in which the victim and the offender, and where appropriate other individuals or community members affected by a criminal offense, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing, and sentencing circles (see paragraph 3, *United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*). A restorative outcome, as mentioned in the definition of a restorative justice program, is “an agreement reached as a result of a restorative justice process. Restorative outcomes include responses and programmes such as reparation, restitution and community

service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.” It is apparent from these definitions that restorative justice is a more utilitarian-focused endeavor that seeks to rehabilitate and reintegrate the convicted person. Importantly, restorative justice focuses on reparation of harm to the victim and the community, one of the specific purposes set out in Article 34.

For a more detailed discussion of the use, operation, and development of restorative justice programs, reference should be made to the *United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*. Reference should also be made to the *Report of the Secretary-General on Restorative Justice* (UN document E/CN.15/2002/5/Add.1). A lot of work is currently being undertaken both outside and inside the United Nations system on restorative justice. Within the United Nations system, work has involved the Group of Experts on Restorative Justice, which should be looked at by any state considering implementing restorative justice mechanisms. Outside of the United Nations system, the work of the Working Party on Restorative Justice may be very useful (see [www.cpcalliance.org](http://www.cpcalliance.org)).

## Article 35: Fundamental Principle

A penalty must be proportionate to the gravity of the criminal offense and the degree of responsibility of the convicted person.

### Commentary

As mentioned above, notwithstanding the articulation of the purposes of the penalties above, the fundamental principle under Article 35 trumps or supersedes the others in the determination of an appropriate penalty. Without having one primary principle of penalties, judges will be left to decipher penalties based on often-competing principles of penalties, which can result in unequal treatment for convicted persons. The Council of Europe’s *Recommendation No. R(92) 17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing* (paragraph A3), and *Recommendations of Professor Ashworth*, document PC-R-SN (90)11 (paragraph A1), which was submitted to the committee during the drafting of the recommendation, recommend that a primary aim of sentencing should be declared. That principle is articulated in Article 35 and is commonly known as the just deserts principle, wherein the appropriate penalty is determined in proportion to the seriousness of the criminal offense (or the harm caused) and the convicted person’s degree of responsibility or culpability. The just deserts principle is being integrated into domestic legislation in many states that have undertaken reforms of their domestic laws on penalties. Some proponents of the just deserts principle hold that other utilitarian factors should not be considered in conjunction with it. However, the drafters of the MCC did not entirely agree with this, and

felt that other secondary considerations may be taken into account, albeit to a lesser extent. The gravity of the criminal offense and the degree of responsibility must also be read in conjunction with other principles relating to penalties, set out in Article 36. One of those other principles, as set forth in Article 36(a), requires that the court look at aggravating or mitigating circumstances in determining a penalty. This requirement adds an extra dimension to the court's reasoning and provides for a greater individualization of the penalty based on the individual circumstances of the convicted person. The aggravating and mitigating circumstances set out in Article 51 also relate to the seriousness of the criminal offense and the gravity of the convicted person's criminal responsibility.

The just deserts principle not only requires that the court consider the gravity of the criminal offense, the degree of responsibility of the convicted person, and individual aggravating and mitigating factors but also requires that the applicable penalty range is proportionate to the level of seriousness of the criminal offense. This means that criminal offenses should be graded according to their seriousness. This issue is dealt with in Article 38 and discussed at length in its accompanying commentary. The just deserts principle also requires that a convicted person's individual penalty be proportionate to other criminal offenses of a similarly serious nature. This second issue is discussed in Article 36(b).

One final issue that arises in relation to the just deserts principle is whether any prior convictions can be taken into account when the court is determining the penalty. One view of the just deserts principle is that prior convictions cannot be considered in any respect, as the person has already been convicted of the other offense, and the court must begin afresh to configure a new penalty based only on the factors set out in Article 35. That said, many states whose legislation provides for the just deserts principle of penalties allow for a consideration of prior penalties as aggravating factors, thus departing somewhat from the "pure" principle of just deserts. The issue of whether or not to consider prior penalties as aggravating factors represents a fundamental tension between the principle of just deserts and that of crime control, which requires that individuals who commit multiple offenses (recidivists) be subjected to more severe penalties than first-time offenders. The MCC follows the position taken in many states and allows a consideration of recidivism as an aggravating factor under Article 51(2)(m). Reference should be made to Article 51 and its accompanying commentary.

## Article 36: Other Principles Relevant to the Determination of Penalties

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In addition to the principles set out in Articles 34 and 35, a court imposing a penalty upon a person must also take into consideration the following principles:

- (a) a penalty should be increased or reduced to account for any relevant aggravating or mitigating circumstances;

- (b) a penalty should be similar to penalties imposed on similar convicted persons for similar criminal offenses committed in similar circumstances;
- (c) all available sanctions under the MCC, other than imprisonment, that are reasonable in the circumstances should be considered for all convicted persons;
- (d) a convicted person must not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances; and
- (e) when a joint penalty for a person convicted of two or more criminal offenses is being imposed under Article 52 or Article 53, the combined penalty should not be unduly long or harsh.

## Commentary

Article 36 provides a number of secondary considerations that should be taken into account along with the fundamental principle under Article 35.

**Paragraph (a):** As mentioned in the commentary to Article 35, in addition to the fundamental principle, it is imperative that the court consider the individual circumstances of the convicted person. This process may work in the favor of the convicted person (i.e., reducing the severity of his or her penalty) or against the convicted person (i.e., increasing the severity of his or her penalty). Reference should be made to Article 35 and its accompanying commentary for a more detailed discussion on aggravating and mitigating factors.

**Paragraph (b):** Also mentioned in the commentary to Article 35 is the fact that the just deserts principle requires the court to consider the seriousness of the convicted person's criminal act in relation to acts of a similarly serious nature. This principle is articulated in Paragraph (b). How exactly is this done? Some states have set up special sentencing bodies or commissions that conduct empirical research on penalties handed down in different cases. Essentially, those bodies group cases according to their similarities, analyze them, and distribute the results to the judges in the state. In other instances, a case compendium is created. Some jurisdictions also draft judges' bench books to give the judge guidance in determining penalties. Commonly, statistical figures on penalties are also provided to judges. Some jurisdictions use training sessions to ensure consistency in the determination of penalties.

**Paragraph (c):** This paragraph introduces the principle of judicial restraint, a principle that is common in newly reformed laws on penalties in many states. It requires that a penalty of imprisonment be used only as a matter of last resort, having regard to the purposes and principles of penalties and any mitigating and aggravating factors. Judicial restraint is closely linked to the principle of proportionality. It requires that judges look to alternatives to imprisonment. In the MCC, these would include the alternative penalties set out in Articles 55–57. A particular post-conflict state may also rely on

restorative justice mechanisms instead of imprisonment. The use of judicial restraint as set out in Paragraph (c) not only introduces an element of proportionality but also softens the blow of the just deserts principle.

In this paragraph, use of the term *sanctions* instead of *penalties*, meaning penalties provided for in the MCC, is deliberate in that it conceives of other measures and sanctions outside the MCC. These measures could include restorative justice outcomes. Reference should be made to the general commentary to Section 12 of the General Part of the MCC, which discusses restorative justice outcomes in more detail.

Some practical issues regarding imprisonment as a potential penalty must also be taken into consideration. In a post-conflict state, prisons have typically either been destroyed or are overcrowded and in a state of disrepair. The result is that there is usually not enough prison space to hold convicted persons. Systems that rely heavily on imprisonment as a penalty for criminal offenses, as has been evidenced in many post-conflict states, encounter great problems in terms of trying to find the resources with which to build or modernize prisons and to ensure that convicted persons are treated humanely and in compliance with international human rights standards. For further elaboration on these issues, reference should be made to the Model Detention Act and its accompanying commentaries. Many states are now turning to alternatives to imprisonment.

**Paragraph (d):** Like Paragraph (c), Paragraph (d) introduces a proportionality and restraint requirement on the court in determining a penalty. Paragraph (d) requires that deprivation of liberty be imposed only when less restrictive measures are not appropriate. Unlike Paragraph (c), Paragraph (d) applies to all deprivations of liberty and thus can apply not only to imprisonment but also to alternative penalties such as semiliberty. The use of the term *sanctions* instead of *penalties* in this paragraph is deliberate in that it conceives of other measures and sanctions outside of the MCC. Thus, for example, Paragraph (d) could include not only noncustodial penalties under the MCC but also restorative justice outcomes. Reference should be made to the general commentary to Section 12 of the General Part of the MCC, which discusses restorative justice outcomes in more detail.

**Paragraph (e):** This paragraph is relevant only where a person is being tried for multiple offenses or where he or she is found criminally responsible for an offense during the execution of a penalty. This paragraph should be read in light of Articles 52 and 53. For a further discussion of this issue, reference should be made to these articles and their accompanying commentaries.

# Section 12

## Subsection 2: Penalty Structure

### Article 37: General Penalty Structure

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1. The following penalties are provided for in the MCC:
  - (a) principal penalties;
  - (b) alternative penalties; and
  - (c) additional penalties.
2. Penalties for legal persons are dealt with in Section 12.
3. Penalties for juvenile persons are dealt with in Section 14 and are considered separately from penalties under Section 12.

### Commentary

**Paragraph 1:** As discussed in the general commentary to this section, state practices differ greatly with regard to applicable penalties. Given that the MCC has adopted the structured discretion approach (discussed in the general commentary to Section 12 of the General Part of the MCC), it is imperative to lay down a set of applicable penalties. Later on, the MCC sets out a structured approach to determining the appropriate penalty. In addition, the MCC contains provisions on the relationship between principal penalties, alternative penalties, and additional penalties.

The terms *principal penalty*, *alternative penalty*, and *additional penalty* may not be familiar to some people, although their equivalents (e.g., *primary*, *additional*, and *ancillary penalties*) are used in their legal systems. While the nomenclature—and the procedure for determining the penalties—may be different, the particular penalties contained in the MCC are common around the world. Article 38, below, defines principal penalty. Article 39 defines alternative penalties, and Article 40 defines additional penalties.

Security measures, or “safety measures” as they are termed in some states, are a common feature in domestic criminal law. These measures may include compulsory treatment in a psychiatric institution and compulsory treatment of persons addicted to alcohol or drugs. The former is usually ordered after a person is found to have been mentally incompetent at the time of the commission of the criminal offense (reference should be made to Article 23, “Mental Incompetence”) or where a person is found to have diminished capacity at the time of commission of the criminal offense; this is not a defense per se but is taken into account as a mitigating factor in the determination of penalties under Article 51(1)(a). In a number of post-conflict environments such as Kosovo persons with serious mental defects were sent to prison rather than to separate treatment facilities due to lack of such facilities. Security measures involving compulsory drug or alcohol addiction treatment are also commonly found in domestic criminal legislation. They are also contained as an international obligation for states parties to the Convention on Psychotropic Substances (1971), Article 22(1)(b), and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), Article 3(4)(b). Compulsory psychiatric treatment and mandatory treatment for drug and alcohol addiction are not considered as separate measures of the MCC. Instead, both can be ordered in conjunction with a suspended sentence under Article 55 or with an order for semiliberty under Article 57.

The other feature of many legal systems not found in the MCC is the penalty of judicial admonition, as it is termed in some systems. In these systems, a judicial admonition exists as a statutory penalty. In systems that have a wide degree of judicial discretion, and consequently where there is no need for legislation to empower a judge to impose a judicial admonition, judicial admonitions or warnings are also commonly used as penalties. A judicial admonition or warning essentially means that the judge warns a person that his or her behavior is serious but does not merit a more severe penalty, and that he or she is free, but that if another offense is subsequently committed, the person may be subject to a more severe penalty. Its most common usage is with minor offenses, such as those carrying a maximum penalty of less than six months’ imprisonment. Given the fact that the MCC does not contain minor offenses—the lowest maximum penalty being one year’s imprisonment—it was considered inappropriate to include judicial admonition as an applicable penalty. For states implementing new criminal law with less severe penalties that could be addressed through the use of judicial admonition, consideration should be given to including a provision in domestic law as part of the alternative penalties available to the court.

The use of parole, or conditional release, which is not a penalty so much as it is a postpenalty noncustodial disposition, is dealt with in Chapter 11, Part 9, of the MCCP. Reference should be made to the relevant provisions and their accompanying commentaries.

When a state is reforming its domestic laws on penalties, it examines the pre-existing penalties that apply under its laws. In addition to adding new penalties, it may wish to consider removing others. For example, many states, in amending their domestic legislation, have chosen to abolish the death penalty as an applicable criminal penalty. Other states have also systematically abolished penalties such as corporal punishment. Corporal punishment, as set out in Amnesty International’s *Fair Trials Manual* (section 25.4), is physical punishment involving blows to the body or mutila-

tion, imposed by judicial order. Corporal punishment is considered a violation of international human rights standards, specifically the right to freedom from cruel, inhuman, and degrading punishment. For further discussion of this issue, reference should be made to section 25.4 of the *Fair Trials Manual*.

**Paragraph 2:** Reference should be made to Articles 68–69 and their accompanying commentaries.

**Paragraph 3:** While there is some interaction between the provisions of Section 12, on the applicable penalties for legal persons, and Section 14, Section 14 must be read completely separately from Section 12 on the basis that the penalties applicable to persons over the age of eighteen years are not relevant to the unique structure that has been created to apply to juveniles. Reference should be made to Section 14 and its accompanying commentaries.

## Article 38: Principal Penalties

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1. The following principal penalties are provided for in the MCC:
  - (a) imprisonment;
  - (b) life imprisonment; and
  - (c) a fine as an alternative principal penalty.
2. A minimum and maximum term of imprisonment for each criminal offense is set out in the Special Part of the MCC.
3. The following minimum and maximum terms of imprisonment are provided for in the MCC:
  - (a) one to five years;
  - (b) two to ten years;
  - (c) three to fifteen years;
  - (d) five to twenty years; and
  - (e) ten to thirty years.

### Commentary

As is common in many systems, the principal penalties under the MCC are imprisonment or a fine. All the criminal offenses in the Special Part of the MCC have been assigned a specific penalty range, as discussed below. Only a small number of the most

serious offenses carry with them a potential penalty of life imprisonment. Conversely, only those considered the least serious of serious offenses carry with them the potential for a principal penalty of a fine instead of imprisonment. A fine may exist either as a principal penalty or as an additional penalty to supplement a principal or alternative penalty. Reference should be made to Articles 50 and 60, below, and their accompanying commentaries.

**Paragraph 1:** For a full discussion on imprisonment, life imprisonment, and fines, reference should be made to Articles 49–51 and their accompanying commentaries.

**Paragraph 2:** There was considerable discussion during the drafting of the Model Codes about whether or not to assign maximum terms of imprisonment or minimum-maximum terms of imprisonment for offenses contained in the MCC. As has been previously discussed, some states allow judges complete discretion in determining the penalty of imprisonment for some criminal offenses. In other states, only the maximum penalty is contained in criminal legislation. Sometimes this is a mandatory maximum penalty, as discussed above in the commentary to Article 38. In other states, both a minimum and a maximum penalty are provided for. The mandatory penalty approach was rejected by the drafters of the MCC because of its lack of flexibility and inability to account for individual circumstances. While some of the experts consulted during the process of vetting the MCC favored the use of maximum penalties only, the approach most favored was assignment of a maximum and minimum term of imprisonment to each criminal offense. Many of the experts consulted felt that this better respected the principle *nulla poena sine lege*, or no penalty without a law.

**Paragraph 3:** One of the greatest criticisms of maximum penalties or minimum-maximum penalties that are set down in legislation is that they are arbitrary and inconsistent with one another. For example, in a particular state (where only maximum penalties are laid down), the maximum penalty of imprisonment for blackmail is the same as the maximum penalty for murder. This situation is common in many states and derives from the fact that penalties for different offenses were not all assigned at the same time. Instead, many penalties in modern criminal codes were decided upon many years ago. Newer criminal offenses are commonly accorded penalties that are often more severe than penalties assigned in the past. The assignment of penalties to new criminal offenses is also often done without reference to preexisting penalties. The law reform commissions of many states have called for a complete overhaul of applicable penalties and a classification and gradation system that accords with the seriousness of the offense. The Council of Europe's *Recommendation No. R(92) 17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing* (paragraph B1) and *Recommendations of Professor Ashworth*, document PC-R-SN (90)11 (paragraph 1), which was submitted to the committee during the drafting of the recommendation (paragraph B1), recommend that "maximum penalties for offenses, and where applicable, minimum penalties should be reviewed so that they form a coherent structure which reflects the relative seriousness of different types of offenses." In some cases, the legislature has followed this advice. In considering law reforms in a post-conflict state, account should be taken of the fact that new

penalties should fit with preexisting ones. A post-conflict state may also wish to give consideration to the total reclassification and reassignment of penalty ranges for all offenses under its domestic criminal law.

With regard to the MCC, because all the offenses were drafted at the same time, it was possible to look at the Special Part of the MCC and its offenses holistically and produce coherent and consistent penalties that accord with the seriousness of the criminal offenses. First, offenses were listed and ranked in order of seriousness from one to five. The purpose of this step was to create a hierarchy of criminal offenses and to group similarly serious criminal offenses together within one minimum-maximum penalty range. A group of experts from a variety of legal systems and backgrounds was assigned the task of ranking the seriousness of different criminal offenses. As might be expected, there were differences of opinion as to which offenses were the most serious. Indeed, throughout the consultation and vetting process, there were differences of opinion as to the seriousness of particular criminal offenses and, consequently, the appropriateness of the penalty range assigned to them. Some experts looked at particular provisions and were surprised at how lenient the penalties were, while other experts looked at the same provisions and observed that the penalties were too harsh. This situation demonstrates the subjective nature of penalties and the need for the legal community and the community at large in a post-conflict state to consider how their society views different criminal offenses.

Once the criminal offenses contained in the MCC were ranked according to their seriousness, the next task was to designate appropriate penalty ranges. The drafters were aware that the Council of Europe's *Recommendation No. R(92) 17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing* (paragraph B2) and the *Recommendations of Professor Ashworth* (paragraph B2) recommended that the range of penalties provided for an offense should not be so wide as to afford little guidance to courts on the relative seriousness of the offense. Five penalty ranges, set out in Paragraph 3, were decided upon, mirroring the five-tier ranking of the seriousness of the criminal offenses.

As mentioned previously, the issue of the sorts of penalties that should be contained in domestic legislation, the relative seriousness of particular criminal offenses, and the appropriate penalty ranges that should be assigned to criminal offenses are all sensitive issues. They are also very subjective issues. The penalty provisions of the MCC are an expression of the opinions of the drafters and the many experts from around the world and from many different legal systems who were consulted during the process of vetting the MCC. A post-conflict state may choose to adopt the MCC's provisions, but, of course, it may instead determine for itself the seriousness of particular criminal offenses and the relevant penalty ranges. The most important thing is that a sound and reasoned process and methodology for deciding upon these issues is followed, so that the determinations made are coherent and logical.

## Article 39: Alternative Penalties

The following alternative penalties are provided for in the MCC:

- (a) suspended sentences;
- (b) community service; and
- (c) semiliberty.

### Commentary

Article 36(c), above, provides for the principle that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered by the judge prior to imprisoning a convicted person. Article 39 provides a range of alternatives to imprisonment. There are good reasons for considering alternatives to imprisonment. One reason is that public safety and security can in some cases be protected without recourse to imprisonment as a penalty. Another reason is that the principle of just deserts in some cases can be served through alternatives to imprisonment; indeed, alternative penalties can serve other principles, too, such as rehabilitation, reparations to the community, promotion of a sense of responsibility in the convicted person, and acknowledgement of harm done to the community, all of which are set out in Article 34. Additionally, post-conflict states may face a lack of prisons or prison space, as well as a lack of personnel and resources to run a prison service in accordance with basic standards of humanity and international human rights. In Rwanda, to cite an extreme example, as many as 125,000 persons accused of participation in the 1994 genocide were crowded into the state's prisons, creating a situation that became not only politically problematic but also financially untenable.

Many states, both post-conflict and non-post-conflict, are currently reconsidering their approaches to penalties, most especially the excessive use of imprisonment, in favor of the use of alternative penalties. The United Nations has also introduced a body of principles known as the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules). The Tokyo Rules say that a state should “provide a wide range of non-custodial measures from pre-trial to post-sentencing dispositions” (paragraph 2.3). They also state that alternative penalties should be provided for by law (paragraph 3.1). Reference should be made to the rules, which offer a longer list of alternative penalties (see paragraph 8.2) than is contained in the MCC and also provide many guidelines on the implementation of alternative penalties. Reference should also be made to Penal Reform International's *A Draft 10-Point Plan: To Reduce Imprisonment*, which also advocates the use of alternative penalties (Point 6).

A post-conflict state that is revising its criminal laws should seriously consider the integration of alternative penalties, which are proving successful in societies across the world. Research indicates that alternative penalties such as community service programs are cheaper than imprisonment over the long term. That is not to say that such

programs do not pose demands on the meager resources available to post-conflict states. For example, establishing a community service program also requires establishing a body to oversee the program's implementation. A post-conflict state introducing alternative penalties needs to provide sufficient financial, staffing, and other resources to facilitate the execution of the particular penalty prior to its introduction into force through legislation. Otherwise, a judge may have no option other than imprisonment, thus augmenting preexisting problems of prison overcrowding. Fortunately, civil society organizations and non-governmental organizations, both domestic and international, often offer funding and assistance in the establishment of alternative penalties programs.

In light of the principle of judicial restraint articulated in Article 36, courts must give due consideration and priority to the use of alternatives to imprisonment. In some post-conflict states, such as Kosovo, research has found that despite the introduction of alternative penalties, judges are still relying on the use of imprisonment simply because they have long been accustomed to imposing prison sentences and, like most people, are slow to embrace new practices. Accordingly, judicial education and awareness training on the use of alternatives to imprisonment might be required when alternative penalties are introduced.

Reference should be made to Articles 55–57 and their accompanying commentaries, below, for a full discussion on suspended sentences, community service, and semi-liberty. The provisions of the relevant articles regulate matters such as the supervision, duration, conditions, and consequences for breach of conditions of a court order.

## Article 40: Additional Penalties

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The following additional penalties are provided for in the MCC:

- (a) a fine;
- (b) confiscation of the instruments and objects of a criminal offense;
- (c) payment of compensation to a victim;
- (d) deprivation of the right to be elected to public office;
- (e) deprivation of the right to possess or carry firearms;
- (f) prohibition on holding a post as a public official;
- (g) prohibition on the exercise of managerial or supervisory positions in private legal entities; or
- (h) expulsion of a non-national.

## Commentary

Articles 58 and 59 of the MCC provide that an additional penalty may supplement either a principal penalty or an alternative penalty. Additional penalties are useful in that they provide the judge with a wider range of options to pursue the secondary purposes of penalties set out in Article 34. By imposing an additional penalty upon a convicted person, a judge can fulfill the purpose of penalties such as the provision of reparations for harm done to the victim through the payment of compensation to the victim under Paragraph (c). Additional penalties also have a role in safeguarding the public from future criminal conduct, related to some degree to the “incapacitation” principle of penalties, through the expulsion of a non-national under Paragraph (h); the prohibition on a convicted person holding a managerial or supervisory position in a private legal entity under Paragraph (g) (appropriate where a person has been convicted of a criminal offense such as embezzlement); the prohibition on holding a post as a public official under Paragraph (f) (appropriate where a public official has committed a criminal offense); the deprivation of the right to be elected to public office under Paragraph (d); and the prohibition on the right to possess or carry firearms under Paragraph (e). Finally, additional penalties may be used in conjunction with principal penalties and alternative penalties to further promote a sense of responsibility in the convicted person, for example, through imposition of fines under Paragraph (a) and the confiscation of the instruments and objects of a criminal offense under Paragraph (e).

Paragraph (h) should be applied bearing in mind fundamental human rights principles, notably the prohibition of expulsion to a state where an individual would be subjected to a violation of the right to life; to torture or other cruel, inhuman, or degrading treatment or punishment; or to other violations of human rights with irreparable consequences.

Reference should be made to Articles 60–67 and their accompanying commentaries for a full discussion of the additional penalties set out in Article 40.

# Section 12

## Subsection 3: Procedure for Determination of Penalties

### General Commentary

The purposes and principles applicable to the determination of penalties, as well as the range and nature of the penalties provided for in the MCC, have been set out and discussed above. This section explains the procedure by which the penalties are determined in light of the purposes and principles of penalties, and in light of those penalties that are available under the MCC.

This subsection lays out, step by step, the method of reasoning to be followed in deciding what penalty to impose upon a convicted person. It has been drafted in a way that brings a judge sequentially through the various factors and considerations that need to be taken into account before arriving at a final penalty. At first glance, the procedure may appear to be a little unconventional, but it does in fact offer the most straightforward way of applying the relevant provisions of the MCC. The procedure lays out all possible steps that the court may take in cases concerning criminal offenses under the MCC. Only some of these steps will have to be taken in any individual case.

The provisions and the procedure have been reproduced in diagrammatic format. The diagram also illustrates when a court may skip a particular step. Reference should be made to annex 3.

## Article 41: General Procedure for Determination of an Appropriate Penalty

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1. The court must decide upon the appropriateness of a particular penalty in light of the fundamental principle set out in Article 35 and the general principles set out in Article 36.
2. The court must adhere to the following procedure:
  - (a) in all cases, the court must first look to the minimum and maximum penalty set out in the MCC for the particular offense for which the convicted person has been found criminally responsible;
  - (b) in all cases, the court must assess whether there are grounds to adjust the appropriate penalty range, either by augmenting the applicable maximum penalty or by reducing the applicable minimum penalty as set out in Articles 43–47;
  - (c) in a relevant case where a person is convicted of the attempted commission of a criminal offense, the court must adjust the penalty range in accordance with Article 48;
  - (d) in a relevant case where life imprisonment is an optional penalty, the court must assess the appropriateness of life imprisonment in light of Article 49;
  - (e) in a relevant case where a fine is an optional principal penalty for the criminal offense for which the convicted person was found criminally responsible, the court must assess the appropriateness of imposing a fine as set out in Article 50;
  - (f) in all cases, the court must then assess the appropriate term of imprisonment to impose, within the applicable penalty range. In doing so, it must take into account the aggravating and mitigating factors set out in Article 51;
  - (g) where a person has been convicted of two or more offenses or where a person is convicted of a criminal offense while under the execution of another penalty, the court must determine a joint penalty under Articles 52 and 53;
  - (h) in relevant cases, once a specific term of imprisonment has been imposed under Paragraph (g), the court must assess under Article 54 whether an alternative penalty is appropriate, instead of a penalty of imprisonment under Articles 54–57; and

- (i) in all cases, once the court has determined an appropriate principal penalty of life imprisonment, imprisonment, or an alternative penalty, the court must assess whether any additional penalties are appropriate under Articles 58–67.

## Commentary

The crux of the procedure established under Article 41 is that the judge first consider the appropriate penalty range provided for in the MCC, then consider any adjustments that can be made to that range. Once the appropriate range has been determined, the judge will consider the appropriate penalty within that range in light of aggravating and mitigating circumstances. It is very important to note that under the MCC a principal penalty (generally one of imprisonment) is imposed upon a person before it is transformed into an alternative penalty. An alternative penalty can be utilized only if a penalty of less than three years' imprisonment is imposed upon the person. So, for example, if X commits a simple robbery and gets one year's imprisonment as a principal penalty, he or she is eligible for an alternative penalty. Where appropriate, the judge will designate an alternative penalty as provided for in the MCC. The importance of designating the original principal penalty becomes relevant if the person does not comply with the conditions of the alternative penalty. In this case, he or she may have to serve the original principal penalty from its beginning. Once an alternative penalty has been assigned, or a principal penalty has been assigned because there was no option to assign an alternative penalty (i.e., where a principal penalty of more than three years' imprisonment was imposed upon the person), the court may then consider whether an additional penalty is also merited.

As mentioned above under the general commentary to Section 12 of the General Part of the MCC, the MCC does not provide for restorative justice programs. Where restorative justice programs are in effect in a state, they must be considered during the determination of the penalty. In some cases, they may act as a mitigating factor only, having no binding legal effect. However, in other domestic jurisdictions, the completion of successful restorative justice programs may preclude the imposition of imprisonment and/or alternative penalties.

**Paragraph 1:** At all times during the penalty determination process, the fundamental principle articulated in Article 35 and the principles set out in Article 36 should be considered. As mentioned throughout the commentaries to this section, the purposes of penalties may also be considered, but only in alignment with Article 35.

**Paragraph 2(a):** At this stage, the judge should look to the specific criminal offense for which the person has been convicted. Reference should be made to the Special Part of the MCC. This minimum-maximum range represents the starting point for the judicial determination of the appropriate penalty.

**Paragraph 2(b):** Articles 44–46 of the MCC set out a number of general aggravating factors that serve to augment the applicable penalty range of a criminal offense, namely,

where the criminal offense is committed as part of an organized criminal gang (Article 44); where the convicted person's actions were motivated by hatred (Article 45); or where the convicted person committed the criminal offense as a public official (Article 46). In each of these cases, when the criteria of the particular article are met, the judge may augment the maximum applicable penalty by up to one-half the maximum penalty. Reference should be made to Articles 44–46 and their accompanying commentaries.

Under the Special Part of the MCC, a number of individual aggravating factors may have the same effect as general factors in augmenting the applicable penalty range for a particular criminal offense. Reference should be made to Article 43 and its accompanying commentary.

The aggravating factors under both the General Part and the Special Part of the MCC that have just been discussed are considered separately from those aggravating circumstances set out in Article 51(1), although there may be some overlap in terms of what qualifies. The aggravating factors mentioned in Article 51(1) serve to augment the penalty *range*, as opposed to the individual *term* of the penalty within the defined range. Aggravating factors that augment the term of the penalty to be imposed are considered during a later stage of the determination process. They are set out in Article 51 and considered in more detail in its accompanying commentary.

In the case of mitigation of penalties, Article 47 provides that in “the presence of particularly mitigating circumstances,” the court may reduce the minimum period of imprisonment. Unlike the situation regarding augmentation of penalty ranges, there is an overlap between mitigating factors that are considered vis-à-vis the reduction of the penalty *range* and the reduction of the specific *term* of the penalty within a defined range. In deciding whether to adjust the minimum range of the penalty, the court must regard the factors set out in Article 51(1). At this stage, the court may declare, for example, that a penalty range of one to five years should be amended and the new minimum penalty should be three months. The court will then move on in its determination of the appropriate penalty within that range as provided for under the proceedings paragraphs. The rationale and procedure for reducing the penalty range in this fashion are discussed in more detail in the commentary that accompanies Article 51.

**Paragraph 2(c):** Under Article 48, when a person is convicted of the attempted commission of a criminal offense, the penalty range may be reduced by half. So, for example, if a person is held criminally responsible for the attempted commission of an offense carrying a minimum penalty of one year and a maximum penalty of five years, the penalty range may be adjusted to six months minimum, two and one-half years maximum. Reference should be made to Article 48 and its accompanying commentary.

**Paragraph 2(d):** Paragraph 2(d) applies only to the limited number of criminal offenses for which life imprisonment is optional, namely, genocide (Article 86), crimes against humanity (Article 87), war crimes (Article 88), and unlawful killing (Article 89), or where a person is convicted of three or more offenses that carry a potential penalty of five to twenty years' imprisonment (Article 52).

The court should consider the appropriateness of life imprisonment as the principal penalty in accordance with the limitations imposed on this penalty in Article 49. Reference should be made to Article 49 and its accompanying commentary.

**Paragraph 2(e):** Paragraph 2(e) applies only to the limited number of criminal offenses that carry a penalty of one to five years' imprisonment, such as assault (Article 90); threats to kill or cause serious harm (Article 93); unauthorized search of a person and his or her belongings (Article 109); unauthorized search of a dwelling or premises (Article 110); unauthorized visual recording (Article 111); possession of child pornography (Article 118); theft (Article 119); fraud (Article 126); possessing false instruments (Article 130); criminal damage (Article 133); counterfeiting money (Article 134); threat and improper influence (Article 146); unauthorized border and boundary crossing (Article 162); unlawful purchase of firearms, ammunition, explosives, or weapons (Article 167); unlawful possession, control, or ownership of firearms, ammunition, explosives, or weapons (Article 168); unlawful use of firearms (Article 169); cultivation of opium poppy, coca bush, or cannabis plant (Article 173); possession or purchase of narcotic drugs or psychotropic substances (Article 176); preventing the exercise of the right to vote (Article 177); violating the free decision of voters (Article 178); abuse of the right to vote (Article 179); violating confidentiality in voting (Article 180); buying and selling votes (Article 181); alteration or destruction of evidence (Article 189); fabrication of evidence (Article 190); presentation of false or forged evidence (Article 191); false testimony (Article 192); obstruction of justice of a witness (Article 193); obstruction of justice of a justice or policing official (Article 194); failure to respect an order of the court (Article 197); providing assistance to a perpetrator after the commission of a criminal offense (Article 198); false statements of a cooperative witness (Article 199); and revealing a sealed order for protective measures or anonymity (Article 200). With regard to these offenses, the court should consider the appropriateness of a fine as the principal penalty in accordance with the limitations imposed in Article 50. Reference should be made to Article 50 and its accompanying commentary.

**Paragraph 2(f):** Once the procedure set out in Paragraphs 2(a) through 2(e) is carried out or, with regard to offenses other than those that fall into Paragraphs 2(b) through 2(e), once the penalty range has been established following the procedure in Paragraph 2(a), the court must consider the term of the penalty to be imposed upon the convicted person within the penalty range. In doing so, the court must take into account the fundamental principle of just deserts (encapsulating the seriousness of the criminal offense and the convicted person's culpability) and the other principles of penalties in the MCC, as provided for in Paragraph 1 of this article, in addition to the aggravating and mitigating factors set out in Article 51. Implicit in the principle of just deserts and also explicit in Paragraph (b) of Article 36, covering other applicable principles, is the fact that similar penalties should be imposed on similar convicted persons for similar criminal offenses committed in similar circumstances—in other words, the principle of like treatment of like convicted persons should be respected. The commentary to Paragraph (b) of Article 36 discusses how this is achieved. Reference should be made to this commentary. During the determination of penalties

phase, provision should be made to implement the aforementioned principle in a practical way.

**Paragraph 2(g):** This paragraph relates only to a situation where a person has been tried and convicted for two or more criminal offenses at the same time, or where the person is convicted separately of another criminal offense during the execution of the original penalty. Reference should be made to Articles 52 and 53 and their accompanying commentaries.

**Paragraph 2(h):** Once the precise term of the imprisonment has been calculated based on Paragraph 2(f), and where applicable Paragraph 2(g), the court must consider the appropriateness of alternative penalties. This step will apply only where the penalty for a single offense, or the aggregate penalty for two or more offenses under Paragraph 2(g), totals three years' imprisonment or less. In this case, the court can then move to determine, based on Articles 55, 56, and 57, whether a suspended sentence, community service, or semiliberty would be an appropriate penalty. Reference should be made to these articles and their accompanying commentaries. In cases where the single or aggregate penalty is greater than three years, the court must consider the appropriateness of additional penalties under Paragraph 2(i), without considering alternative penalties.

**Paragraph 2(i):** Where a principal penalty or an alternative penalty has been decided upon by the court, it may also supplement the penalty with an additional penalty. Reference should be made to Articles 58 and 59 and Articles 60–67 and their accompanying commentaries.

## Article 42: Appraisal of the Applicable Minimum and Maximum Penalty

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The court must look to the relevant provision of the Special Part of the MCC for the minimum and maximum penalty applicable to the criminal offense for which a person has been convicted.

## Article 43: Augmentation of the Maximum Period of Imprisonment Based on Individual Aggravating Factors Set Out in the Special Part of the MCC

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The court must look to the relevant provision of the Special Part of the MCC to ascertain whether there are any individual aggravating factors applicable to the criminal offense for which a person has been convicted.

### Commentary

The MCC contains two types of aggravating factors whose application may result in the augmentation of the applicable penalty range for a particular criminal offense. The first type of aggravating factor, an individual aggravating factor, is dealt with in Article 43 and in the Special Part of the MCC. Individual aggravating factors include factors such as those contained under Article 137, “Offenses Related to the Smuggling of Migrants,” which augments the applicable penalty range where the commission of the offense endangered, or was likely to endanger, the lives or safety of the migrants concerned, or where it entailed inhuman or degrading treatment. Reference should be made to the commentary to Article 137. In relation to property offenses such as theft, fraud, criminal damage, and embezzlement, the applicable penalty range is augmented where the property that was stolen or was subject to fraud or criminal damage was of “high value.” For both drug offenses and offenses relating to firearms, ammunition, weapons, or explosives, individual aggravating factors were included in provisions augmenting the applicable penalty range where a person has been convicted of dealing with “large quantities” or “trafficable quantities” of either drugs, firearms, ammunition, weapons, or explosives. Reference should be made to Article 167, “Unlawful Purchase of Firearms, Ammunition, Explosives, or Weapons”; Article 168, “Unlawful Possession, Control, or Ownership of Firearms, Ammunition, Explosives, or Weapons”; Article 170, “Trafficking in Narcotic Drugs and Psychotropic Substances”; Article 171, “Possession or Purchase of Narcotic Drugs or Psychotropic Substances for the Purpose of Trafficking”; Article 172, “Organizing, Managing, or Financing Trafficking in Narcotic Drugs and Psychotropic Substances”; Article 173, “Cultivation of Opium Poppy, Coca Bush, or Cannabis Plant”; and Article 174, “Manufacture, Transport, or Distribution of Precursors.”

The individual aggravating factors discussed above and contained in the MCC are in contrast to the general aggravating factors contained in Articles 44–46. Both general and individual aggravating factors should be considered in the course of determining an appropriate penalty.

## Article 44: Augmentation of the Maximum Period of Imprisonment When a Criminal Offense Is Committed as Part of Organized Criminal Activity

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1. The court may augment the maximum penalty prescribed for a particular criminal offense, for a period up to one-half of the maximum penalty prescribed for that criminal offense, when this course is justified by the presence of aggravating circumstances and when the convicted person committed the criminal offense as part of the organized criminal activity.
2. Article 44 does not apply to the criminal offense of participation in an organized criminal group, discussed in Article 136.
3. When the maximum period of imprisonment is augmented by the court, it may not impose a period of imprisonment longer than thirty years.

### Commentary

Article 44 lays out a general aggravating factor that may be applied to any criminal offense with the exception of the offense of participation in an organized criminal group, discussed in Article 136, as this offense already involves the sort of activity covered in this article. Article 44, in contrast to Article 136, looks at participation in an organized criminal *activity*, as opposed to an organized criminal *group*, as the applicable aggravating factor. When a convicted person is found to have committed the applicable criminal offense as part of an organized criminal activity, and where there are aggravating circumstances, the maximum penalty may be augmented. In a post-conflict state where organized criminal activities pose a significant threat to stability, such a provision may be an important tool.

Where the court chooses not to augment the applicable penalty range, it may still consider the commission of the criminal offense as part of an organized criminal group to be an aggravating factor in determining an appropriate penalty, as provided for in Article 51(2)(1).

**Paragraph 3:** This paragraph sets out the principle that in augmenting the maximum period of imprisonment, the court may not impose a period of imprisonment of more than thirty years. Thirty years' imprisonment is the highest applicable penalty, bar that of life imprisonment. Because life imprisonment under the MCC is imposed only in a small number of the most serious offenses, it was considered inappropriate to extend its scope to other individual offenses. Thus Paragraph 3 precludes the use of life

imprisonment when the maximum penalty is augmented based on participation in an organized criminal activity.

## Article 45: Augmentation of the Maximum Period of Imprisonment When a Criminal Offense Is Motivated by Hatred

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1. Except in relation to the criminal offense of “Incitement to Crime on Account of Hatred,” under Article 161, the court may augment the maximum penalty prescribed for a particular criminal offense, for a period of up to one-half of the maximum penalty prescribed for that criminal offense, when this course is justified by the presence of aggravating circumstances and when the criminal offense was motivated by hatred based on race; color; religion or belief; gender; age; political or other opinion; national, ethnic, or social origin; disability; sexual orientation; or birth status.
2. When the maximum period of imprisonment is augmented by the court, the court may not impose a period of imprisonment longer than thirty years.

### Commentary

Article 161 of the MCC criminalizes a person for incitement to crime on account of hatred. Reference should be made to Article 161 and its accompanying commentary. The MCC does not criminalize the commission of a criminal offense with a specific hate motive, as is the case in some jurisdictions. The criminalization of incitement to crime on account of hatred is an international obligation, as discussed in the commentary to Article 161. However, there is considerable disagreement among different states, and a considerable divergence in practice, in relation to the penalization of the perpetrator of a criminal offense motivated by hate. Some states have criminalized this form of aggravated commission of a criminal offense and provide for steep penalties. The drafters of the MCC were cognizant of the importance, particularly in a post-conflict state, of addressing hate crimes. However, they were also aware that the power to punish hate crimes is a very powerful tool that can be abused. A compromise position was thus reached that allows the applicable penalty range for a criminal offense motivated by hatred to be augmented when the court considers it appropriate.

Where the court chooses not to augment the applicable penalty range, the court may still consider the presence of hatred to be an aggravating factor in sentencing, as provided for in Article 51(2)(e).

The criminal offense of incitement to crime on account of hatred is excluded from the ambit of this article, as there is already an aggravating hate factor contained in the elements of the criminal offense.

**Paragraph 2:** Reference should be made to the commentary to Article 44(3).

## Article 46: Augmentation of the Maximum Period of Imprisonment for a Criminal Offense Committed by a Public Official

1. The court may augment the maximum penalty prescribed for a particular criminal offense, for a period of up to one-half the maximum penalty prescribed for that criminal offense, when the criminal offense was committed by a public official while he or she was acting in his or her role as a public official.
2. This provision does not apply to the commission of the criminal offenses:
  - (a) of corruption involving a public official as defined in Article 138;
  - (b) of corruption involving a foreign public official or an official of a public international organization as defined in Article 139; and
  - (c) contained in Section 10 of the Special Part of the MCC.
3. When the maximum period of imprisonment is augmented by the court, the court may not impose a period of imprisonment longer than thirty years.

### Commentary

The elements of some criminal offenses, such as those listed in Paragraph 2, require that they be committed by a public official. Reference should be made to the relevant articles. These offenses are excluded from the scope of Article 46 because the penalties attached to them already take into consideration the fact that they were perpetrated by a public official who abused his or her position of trust. For all other criminal offenses, the court may augment its applicable maximum penalty when the criminal offense was committed by a person while he or she was acting in his or her role as a public official. Reference should also be made to Article 1(9) on the definition of *public official*.

The underlying rationale for Article 46 is to encourage public officials to perform their duties with integrity and honesty. A similar rationale underlies the prohibition on holding a post as a public official set out in Article 65 as an additional penalty. The

drafters of the MCC considered it important to take strong measures against the abuse of a position of trust by a public official. Post-conflict states may well have a history of abuse of public office and corruption, a history that must be addressed to build a society that is governed by the rule of law.

**Paragraph 2:** Reference should be made to the commentary to Article 44(3).

## Article 47: Reduction of the Minimum Period of Imprisonment Due to Particularly Mitigating Circumstances

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The court may reduce the minimum penalty prescribed for a particular criminal offense by one-half the minimum penalty prescribed for that criminal offense when the presence of particularly mitigating circumstances justifies the reduction.

### Commentary

During the course of drafting the penalties provisions in the MCC, there was much debate among experts about whether to use the minimum-maximum penalty system or simply to provide for a maximum penalty for each individual criminal offense. The drafters eventually decided to adopt the minimum-maximum penalty system, but they also decided to put that system within the framework of structured discretion. As a consequence, while the penalty structure and penalty procedure exist, they are not totally rigid. For example, mitigating and aggravating circumstances have a substantial effect on the particular term of imprisonment that is decided upon within the applicable minimum and maximum penalty range.

Despite this flexibility, the drafters of the MCC and many of the experts consulted in the course of vetting the MCC were concerned about a rigid minimum penalty. Many argued that this system could provide for unjust results, where a person is convicted of a criminal offense but where significant mitigating circumstances merit a penalty below the minimum provided for the particular offense. They argued that there should be a mechanism that allows a court to impose a penalty of less than one year's imprisonment in the case of a criminal offense carrying a potential penalty of one to five years' imprisonment or, in relation to the other penalty ranges, to depart from the minimum periods of imprisonment. This is why Article 47 has been included in the MCC. Its effect is on the minimum-maximum penalty range rather than on the term of imprisonment within that range. Some experts expressed concern that allowing for a reduction in the minimum period of imprisonment runs counter to the principle of legality set out in Article 3. The structured-discretion approach adopted in the

MCC is, however, consistent with the principle of legality. As discussed in the commentary to Article 3, the principle of legality does not require that judges have no discretion but rather that this discretion be appropriately guided by legislation, which is the case in Article 47.

## **Article 48: Reduction of the Minimum Period of Imprisonment for Attempted Offenses**

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The court may reduce the minimum penalty prescribed for a particular criminal offense by one-half the minimum penalty prescribed for that criminal offense when the convicted person is convicted of attempt to commit a criminal offense.

### **Commentary**

Reference should be made to Article 27, “Attempt,” and its accompanying commentary. As mentioned in that commentary, despite the intention of the perpetrator, an attempt does not become a completed offense if he or she has been frustrated in one way or another. The fact that the criminal offense was not fully completed merits some consideration by the court in determining an appropriate penalty. Where the court sees fit, it may reduce the minimum applicable penalty range for an attempted offense.

## **Article 49: Determination of the Appropriateness of Life Imprisonment as a Principal Penalty**

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1. Life imprisonment is provided for as a principal penalty in the MCC.
2. Life imprisonment may be imposed as a principal penalty only where it is specified in the Special Part of the MCC and only where:
  - (a) the criminal offense was committed intentionally; and

- (b) life imprisonment is justified by the presence of particularly aggravating circumstances.
3. Life imprisonment may also be imposed in accordance with Article 52.
  4. Life imprisonment may not be imposed upon a convicted person who was under eighteen years of age at the time of the commission of a criminal offense.

## Commentary

States differ greatly in principle and in practice in their approaches to the issue of life imprisonment. In some states, life imprisonment is constitutionally prohibited as cruel, inhuman, or degrading punishment and therefore is not an applicable penalty. In other states, despite a lack of constitutional prohibition, there exists a legal prohibition on life imprisonment through setting the maximum allowable period of imprisonment at a particular level, for example, thirty years. In yet other states, life imprisonment is provided as a mandatory sentence with respect to some serious criminal offenses. The MCC allows for the possibility of life imprisonment for a small number of criminal offenses, namely, genocide (Article 86), crimes against humanity (Article 87), war crimes (Article 88), and unlawful killing (Article 89). The court is restrained in the imposition of life imprisonment by two limitations specified in Article 49(2). First, the criminal offense must be committed intentionally. Second, there must be “particularly aggravating circumstances.” In considering whether to impose a penalty of life imprisonment upon a person, the court must have regard to the fundamental principle in Article 35 and the other principles in Article 36 (including aggravating and mitigating circumstances), in particular Paragraph (b) on judicial restraint in imposing a sentence of imprisonment.

**Paragraph 3:** Reference should be made to Article 52 and its accompanying commentary.

**Paragraph 4:** It is prohibited to impose a penalty of life imprisonment upon a convicted person who was under eighteen years old at the time of commission of the criminal offense. This provision is based on the fact that there are different purposes applicable to juvenile dispositions that are not met by providing for a term of life imprisonment for a juvenile, as discussed in Section 14 of the General Part and its accompanying commentaries. Article 37(a) of the United Nations Convention on the Rights of the Child prohibits life imprisonment without the possibility of release for persons who were under the age of eighteen years when the offense was committed. Paragraph 4 seeks to implement this international standard. All the experts consulted during the process of vetting the MCC supported the prohibition on life imprisonment for juveniles and for adults who committed a criminal offense while still a juvenile.

## Article 50: Determination of the Appropriateness of a Fine as a Principal Penalty

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1. A fine as an alternative principal penalty applies to criminal offenses that carry a potential penalty of one to five years' imprisonment, as set out in the Special Part of the MCC.
2. A fine may be no less than [insert monetary amount] and may not exceed [insert monetary amount].
3. The court must consider the convicted person's ability to pay the fine in assigning a particular fine.
4. In imposing a fine, the court must allow the convicted person a reasonable period of time in which to pay the fine.
5. The court may provide for payment of a lump sum or payment by way of installments paid at designated dates during a designated time frame.
6. In the case of willful nonpayment of a fine, the court, where it is satisfied that all available enforcement measures have been exhausted, may impose upon the convicted person:
  - (a) a term of imprisonment for a period not exceeding one year; or
  - (b) an alternative penalty under Subsection 4 of Section 12.

### Commentary

The use of a fine as a principal penalty is applicable only to certain less serious offenses. Article 50 sets out principles and procedures relevant to the imposition of fines.

In considering whether to impose a penalty of a fine upon a person, the court must have regard to the fundamental principle in Article 35 and the other principles in Article 36 (including aggravating and mitigating factors), in particular Paragraph (c) on judicial restraint in imposing a sentence of imprisonment and the principle that requires that the less restrictive penalty be imposed if appropriate.

**Paragraph 1:** The method of determining an appropriate fine differs from state to state. Some states have a complex system of fine calculation in which the convicted person is fined in proportion to his or her daily income. This is called the day fine system. The daily income of a convicted person is assessed and a set number of days are designated as the penalty to be imposed upon the person. For example, he or she may

be required to pay the equivalent of thirty days of income. This mode of calculation is considered superior in some respects because it takes the individual earning capacity of the convicted person into account. Critics of the day fine system charge that it works to the prejudice of poor convicted persons while allowing rich convicted persons to escape imprisonment. Some consideration was given to the use of the daily fine system, although it was eventually decided not to include it into the MCC in spite of its apparent merits. One reason it was not included is because systems using this mode of calculation have experienced difficulties in determining and calculating the actual income of convicted persons. Another reason for not using this process in the MCC is that it is quite complicated and requires systems and structures that might not be available in a post-conflict state. Further, in many post-conflict states, accurate and official earning records may simply not exist. Instead, minimum and maximum fines have been introduced into the MCC. The proviso to this process, set out in Paragraph 3, is that the court must look at the convicted person's ability to pay the fine in this regard.

**Paragraph 6:** The issue of what to do when a convicted person defaults on the payment of a fine is hotly debated in states considering the reform of penalty provisions, including systems for the payment of fines. In some states, default on a fine leads to automatic imprisonment. Were this system to be adopted in the MCC, the problem of lack of prison space and resources would come into play. Instead of a system of automatic imprisonment for fine default, the MCC allows the court to consider either an alternative penalty or a term of imprisonment, not in excess of one year.

## **Article 51: Determination of the Appropriate Term of Imprisonment in Light of General Mitigating and Aggravating Circumstances**

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1. In determining an appropriate penalty to impose upon a convicted person, the court must take into account any mitigating factors based on the individual circumstances of the convicted person, including but not limited to:
  - (a) circumstances falling short of grounds for exclusion of criminal responsibility, for example, diminished mental capacity;
  - (b) evidence of provocation by the victim;
  - (c) the personal circumstances and character of the convicted person;

- (d) evidence that the convicted person played a relatively minor role in the criminal offense;
  - (e) the fact that the convicted person participated in the criminal offense not as the principal perpetrator but through aiding, abetting, or otherwise assisting him or her;
  - (f) the age of the convicted person, whether young or elderly;
  - (g) evidence that restitution or compensation was made to the victim by the convicted person;
  - (h) general cooperation with the court, including voluntary surrender of the convicted person;
  - (i) the voluntary cooperation of the perpetrator in a criminal investigation or prosecution;
  - (j) the entering of a plea of criminal responsibility (a guilty plea);
  - (k) any remorse shown by the convicted person;
  - (l) post-conflict conduct of the convicted person; and
  - (m) in the case of a person convicted of the criminal offense of enforced disappearance, under Article 104, effectively contributing to bringing the disappeared person forward alive or voluntarily providing information that contributes to solving cases of enforced disappearance or identifying those responsible for the criminal offense of enforced disappearances.
2. In determining an appropriate penalty to impose upon a convicted person, the court must take into account any aggravating factors based on the individual circumstances of the convicted person, including but not limited to:
- (a) a high degree of participation of the convicted person in the criminal offense;
  - (b) a high degree of intention on the part of the convicted person, including any evidence of premeditation;
  - (c) the presence of actual or threatened violence in the commission of the criminal offense;
  - (d) whether the criminal offense was committed with particular cruelty;
  - (e) whether the criminal offense was committed for any motive involving discrimination on account of hatred for a national, ethnic, racial, religious, or similarly identifiable group;
  - (f) whether the criminal offense involved multiple victims;
  - (g) whether the victim of the criminal offense was particularly defenseless or vulnerable;

- (h) the age of the victim, whether young or elderly;
  - (i) the extent of the damage caused by the convicted person, including death, permanent injury, the transmission of a disease to the victim, and any other harm caused to the victim and his or her family;
  - (j) any abuse of power or official capacity by the convicted person in the perpetration of the criminal offense;
  - (k) evidence of a breach of trust by the convicted person;
  - (l) whether the criminal offense was committed as part of the activities of an organized criminal group; or
  - (m) any relevant prior criminal convictions of the convicted person.
3. The court must designate a period of imprisonment within the minimum and maximum terms of imprisonment provided for the particular criminal offense based on any aggravating or mitigating circumstances.
  4. Once the court has designated a term of imprisonment, it must then deduct the time, if any, previously spent in detention under court order or in an institute for the care of mentally ill persons, prior to or during the trial. The court may deduct any time otherwise spent in detention in connection with conduct underlying the criminal offense.
  5. The period of imprisonment imposed by the court under Paragraph 3, and the period of imprisonment that the convicted person must serve, if different (based on any time that has been deducted under Paragraph 4), must be pronounced in years, months, and days.

## Commentary

Once the court has determined the applicable penalty range, it must then decide what term of imprisonment to impose upon a convicted person within that particular range. Whether that term is high or low will depend on the presence or absence of aggravating and mitigating factors, the former augmenting the potential term and the latter reducing the potential term. In this phase of the determination of the penalty, the court takes into account individual factors relating to the convicted person and to the particular offense he or she has committed. The mitigating and aggravating factors provided for in this article are elaborative but not exhaustive; the court may take into account any other relevant factors in addition to the ones mentioned in Article 51. In line with the Council of Europe's *Recommendation No. R(92) 17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing and Recommendations of Professor Ashworth* (document PC-R-SN [90]11, paragraph C2), major aggravating and mitigating factors must be clarified in law.

**Paragraph 1:** The mitigating factors set out in Paragraph 1 have been arrived at after a comparative survey of sentencing/penalties legislation from different legal systems around the world. The list has also been lengthened by incorporating the suggestions of individual experts consulted during the process of vetting the MCC. Considerable attention was also given to international conventions that specify, in relation to certain criminal offenses, particular mitigating factors that should be taken into account in the determination of a penalty (see the discussion under Paragraph 1[m]). Also included in the comparative survey was a detailed study of mitigating factors that have been taken into account by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The purpose of this study was to elucidate factors that were common in both domestic and international practice and to ensure that factors relevant to the penalization of persons convicted of the criminal offenses of genocide, crimes against humanity, and war crimes were included in Article 51 (given that these criminal offenses are contained in the Special Part of the MCC). Most of the mitigating factors considered in international forums are common to domestic systems, bar factors such as those in Paragraph 1(l).

The MCC imposes a mandatory obligation upon the court to consider these mitigating factors, in addition to any other relevant factors. In its judgment, the court must articulate which factors it took into account and how they affected the term of imprisonment to be imposed.

**Paragraph 1(a):** The MCC sets out various grounds for excluding criminal responsibility in Section 9, Articles 23–26. When a person falls under any of these grounds, he or she is not held to be criminally responsible for the criminal offense he or she committed. In some cases, a person may not qualify for a defense based on one of these grounds, as the evidence of the defense is not strong enough to fully absolve the person from criminal responsibility. That said, the evidence taken into account may be applied to mitigate a penalty rather than to absolve a person from this penalty. Mental incompetence, under Article 23, is a prime example. A person may not qualify under this ground, as Article 23 provides for a very strict test. Reference should be made to Article 23 and its accompanying commentary. A person may not be “mentally incompetent,” but he or she may be suffering from “diminished responsibility,” meaning his or her mental competence is not “destroyed” (as required in Article 23) but is “diminished” through an abnormality of mind that substantially impairs his or her mental responsibility for his or her acts. In some states, diminished responsibility is known as a “partial defense,” under which a person found criminally responsible for murder may be liable only for manslaughter if diminished responsibility is proven. Under the MCC, diminished responsibility is a mitigating factor rather than a partial defense.

**Paragraph 1(b):** In some legal systems, the existence of provocation, like diminished responsibility discussed above, is a partial defense to criminal offenses such as murder. Provocation means that the offender, by reason of things that were done or said to him or her, was provoked by the victim to lose his or her self-control.

**Paragraph 1(c):** This is a general provision that allows for the introduction of character evidence about the convicted person and evidence as to his or her personal circum-

stances that would act in mitigation of the penalty. It might show, for example, that the exhibition of violence during the commission of a criminal offense was totally out of character for the convicted person.

**Paragraph 1(e):** Under Article 31, a person who aids, abets, or otherwise assists in the commission of a criminal offense is held to be liable for the perpetration of the criminal offense. The position adopted by the drafters of the MCC is that the person is an accomplice to the commission of the criminal offense rather than an accessory (in which case the person could not be held liable as the principal perpetrator). In states that have adopted a line of reasoning similar to that adopted by the drafters of the MCC, domestic legislation contains specific reference to the mitigation of the applicable penalty on the basis that the person's level of participation was not as serious as that of the principal perpetrator of the criminal offense. The court may wish to take this into account in assigning an appropriate penalty to a convicted person. The exact mitigating effect this will have on the penalty to be imposed will depend on the level of aiding, abetting, or otherwise assisting. Obviously, the less the degree of assistance, aid, or abetment provided to the perpetrator, the more leniently a court may look upon a convicted person.

**Paragraph 1(g):** Restorative justice programs may be considered under this mitigating ground. Reference should be made to the general commentary to Section 12 and Article 34 of the General Part of the MCC.

**Paragraph 1(i):** Under the MCCP, a person may qualify as a cooperative witness where the criteria laid down in Chapter 8, Part 4, Section 3, are met. Reference should be made to the relevant articles and their accompanying commentaries. Where a person does not satisfy the criteria, or where he or she is ineligible to apply to be a cooperative witness (e.g., where he or she is accused of genocide, crimes against humanity, or war crimes and is thus precluded from applying for cooperative witness status), under Paragraph 1(i) any cooperation with the court may still be considered a factor that will act in favor of the convicted person when the penalty is being determined.

**Paragraph 1(j):** The MCCP provides a mechanism called proceedings upon admission of criminal responsibility, under which a person can claim criminal responsibility for a criminal offense, often in the hope of receiving a mitigation of his or her penalty. An agreement may even be entered into with the prosecutor. The agreement with the prosecutor is not binding upon the court. However, it can play a considerable role in the mitigation of a penalty under this paragraph. The court may wish to take any plea agreement between the prosecutor and the convicted person, although it is not bound by it.

**Paragraph 1(l):** As mentioned above, a survey of mitigating factors taken into account by the two international ad hoc criminal tribunals was undertaken in the course of drafting the MCC provisions. One finding that is unique to the tribunals and not contained in domestic legislation is that of the post-conflict conduct of the convicted per-

son. This could include, for example, any efforts of the convicted person to bring about national reconciliation after the conflict.

**Paragraph 1(m):** This mitigating factor is specified in the United Nations Declaration on the Protection of All Persons from Enforced Disappearances, Article 4(2), and the United Nations International Convention on the Protection of All Persons from Forced Disappearances, Article 5(2).

**Paragraph 2:** The aggravating factors set out in Paragraph 2 were arrived at after a comparative survey of sentencing/penalties legislation from different legal systems around the world.

The MCC imposes a mandatory obligation upon the court to consider these aggravating factors, in addition to any other relevant factors. In its judgment, the court must articulate which factors it took into account and how they affected the term of imprisonment to be imposed.

Paragraphs 2(e), 2(j) (in the context of the person being a public official), and 2(l) are also factors that the court may use to augment the penalty *range*, as opposed to the *term* of the penalty. Where the court decides not to augment the penalty term, it may still consider these factors as aggravating factors in determining the term of the penalty within the original penalty range.

Paragraphs 2(a) through 2(e) of Paragraph 2 deal with the conduct and intention of the convicted person during the criminal offense; Paragraphs 2(f) through 2(i) deal with issues relating to the victim; Paragraphs 2(j) and 2(k) address abuses of position in the commission of the criminal offense; Paragraph 2(l) discusses the commission of the criminal offense in the context of organized criminal activities; and, finally, Paragraph 2(m) relates to recidivism, an issue aside from that of the criminal offense in question.

**Paragraph 2(a):** Whether the convicted person directly perpetrated the criminal offense or had a lesser degree of participation, such as aiding or abetting, should be taken into account in the determination of a penalty. Obviously, the greater the degree of participation in the criminal offense, the greater the importance of this aggravating factor. Reference should be made to Section 11 of the General Part, “Participation in a Criminal Offense,” and its accompanying commentaries.

**Paragraph 2(b):** Where there is a high degree of intention on the part of the convicted person, such as where the criminal offense was premeditated or planned, this will constitute an aggravating factor.

**Paragraph 2(m):** As mentioned in the commentary to Article 35, a fundamental tension exists between the just deserts principle followed in the MCC and the augmentation of penalties on account of recidivism. *Recidivism* means a relapse in criminal behavior. Paragraph 2(m) thus applies to repeat offenders or persons who exhibit a pattern of criminal behavior. The Council of Europe’s *Draft Recommendations on Consistency in Sentencing of the Committee of Ministers of the Council of Europe* (paragraph D1) provides that recidivism should not be used mechanically at any stage of the

proceedings against the defendant; while recidivism can be taken into account as an aggravating factor, the focus should be on the seriousness of the offense and not on prior tendencies toward criminality. The *Recommendations of Professor Ashworth* (document PC-R-SN [90]11) states that “the imposition of substantial penalties on recidivists convicted of minor crimes goes against the policy of judicial restraint in the use of imprisonment, as well as fostering inconsistency.” Ultimately, the court will need to look at the criminal history of the convicted person and consider the seriousness of any prior offenses in addition to the pattern of criminal conduct and their proximity in time and type to the current offense.

**Paragraph 3:** If a penalty of less than three years’ imprisonment is imposed upon the convicted person at this stage in the determination of a penalty, the court may move to consider the possibility of alternative penalties. If a penalty of more than three years’ imprisonment is imposed upon the person, the court must move to Paragraph 4 and deduct any prior periods of detention from the term of imprisonment imposed.

**Paragraph 4:** Any time spent in detention prior to the trial or during the trial must be deducted from the final term of imprisonment imposed upon a convicted person. This is standard practice throughout the world. Therefore, if a person were sentenced to five years’ imprisonment, but he or she had already served one year in pretrial detention and detention during trial, the judgment should state that the term of imprisonment is five years but the convicted person will serve four years’ imprisonment. In addition to time spent in detention pretrial or during the trial, any time spent in an institute for the care of mentally ill persons should be deducted from the final term of imprisonment. A person may spend time in an institute for the care of mentally ill persons when he or she has been declared temporarily mentally incompetent.

## Article 52: Determination of a Joint Penalty for Convictions on Two or More Criminal Offenses

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1. When a person has been convicted of two or more criminal offenses in the same proceedings, the court must pronounce a penalty for each individual criminal offense and then impose a joint penalty.
2. The joint penalty must exceed the highest individual penalty pronounced and must be less than the sum of all the individual penalties pronounced. In the case of a penalty of imprisonment, the joint penalty must not exceed thirty years.

3. In the case of a penalty of imprisonment, the joint penalty must not exceed ten years when each of the individual penalties imposed by the court is less than three years.
4. Exceptionally, a joint penalty of life imprisonment may be imposed when the court has pronounced individual penalties each exceeding fifteen years' imprisonment for at least three criminal offenses and where life imprisonment is justified by particularly aggravating circumstances.

## Commentary

**Paragraph 1:** When a person is convicted of two or more offenses, the applicable term of imprisonment for each offense should be considered separately. The procedure set out in Article 41 should be undertaken for each criminal offense, and individual applicable terms should be determined.

**Paragraph 2:** Under the MCC, where a person has been found criminally responsible for two or more criminal offenses, the court must decide upon a joint penalty for all the criminal offenses. This joint penalty must be greater than the highest individual penalty pronounced by the court but must also not exceed thirty years. Thirty years was determined by the drafters of the MCC as the maximum joint penalty that should be imposed upon a convicted person, except as provided for in Paragraph 4 (or where a particular criminal offense provides for life imprisonment as the maximum potential penalty). The restrictions on the maximum length of the joint penalty apply to imprisonment but also to alternative penalties, such as semiliberty and community service, and also to additional penalties, such as expulsion of a non-national.

**Paragraph 3:** The purpose of this paragraph is to ensure that, where a person is convicted of a number of criminal offenses for which the court pronounces a relatively low penalty, the person is not sentenced to a joint penalty that is disproportionate to the gravity of the individual offenses.

**Paragraph 4:** Under this paragraph, where the court pronounces individual penalties each of fifteen or more years' imprisonment, the court has the option to impose a joint penalty of imprisonment. Thus, for instance, where a person is convicted on three separate counts of rape (all of which are committed in a particularly heinous manner) and in each case a penalty of sixteen years' imprisonment is pronounced by the court, the court may impose a joint penalty of life imprisonment rather than be limited by the thirty-year maximum limitation set out in Paragraph 2. By its nature, this provision is limited to those situations concerning criminal offenses in the higher penalty ranges. In addition, life imprisonment may only be imposed as a joint penalty where the court finds particularly aggravating circumstances.

## Article 53: Subsequent Imposition of a Penalty on a Convicted Person

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1. When a person who is currently serving a penalty for an offense is convicted of another offense that was committed prior to the conviction for the first offense, the court must impose a joint penalty under Article 52 for the first and the second offenses.
2. When a person who is currently serving a penalty for an offense commits another offense, the court must impose a separate penalty for the new criminal offense, which will come into effect only when the previous penalty has expired.

### Commentary

This article applies to criminal offenses committed during the execution of a penalty or prior to the imposition of the initial penalty. Paragraph 1 deals with a scenario where a person who has been convicted of a criminal offense (offense 1) and is serving this sentence is then convicted of another criminal offense (offense 2) that was committed prior to conviction on offense 1. In this scenario, the penalties pronounced for offense 1 and offense 2 are taken into account together to create a joint penalty under Article 52.

Under Paragraph 2, a person is serving a penalty for a criminal offense and commits a criminal offense while he or she is serving that penalty (i.e., after the person has been convicted by the court). In this scenario, in contrast to Paragraph 1, the offenses and their accompanying penalties are dealt with separately rather than by way of joint penalty.

## Article 54: Replacement of a Principal Penalty with an Alternative Penalty

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1. When the court pronounces a penalty of imprisonment not exceeding three years, either for a single offense or for multiple offenses, prior to any deductions spent in detention under Article 51(4), it may then replace this principal penalty of imprisonment with an alternative penalty.

2. In determining whether an alternative penalty is more appropriate than the principal penalty of imprisonment, the court must have regard to:
  - (a) the gravity of the criminal offense committed;
  - (b) the gravity of the consequences of the criminal offense;
  - (c) the degree of criminal responsibility of the convicted person;
  - (d) any aggravating and mitigating factors set out in Article 51; and
  - (e) the character and personal circumstances of the convicted person.

## Commentary

Reference should be made to the commentary to Article 39, discussing alternative penalties. Reference should also be made to the commentary to the principles applicable to penalties, particularly Articles 36(c) and 36(d), which also discuss the need and benefits of imposing alternative penalties.

**Paragraph 1:** After the court has imposed a term of imprisonment upon a person, and that term for either a single offense or multiple offenses is less than three years, the court moves to a new stage in the determination of the penalty: determination of the appropriateness of an alternative penalty. If this step is considered appropriate, the court must choose which alternative penalty to impose, and then it must follow the guidelines set out in Article 55 (on suspended sentences), Article 56 (on community service), or Article 57 (on semiliberty). Obviously, alternative penalties will not be appropriate in all cases. Nor are they appropriate in the case of very serious criminal offenses, which is why a three-year term of imprisonment was chosen as a cut-off point. The MCC contains only relatively serious offenses. In post-conflict states where legislation regulates less serious offenses, alternative penalties are a valuable tool in dealing with this level of criminality. According to the Council of Europe's Recommendation (92)17 Concerning Consistency in Sentencing, paragraph B5(2), "custodial sentences should be regarded as a sanction of last resort, and should therefore be imposed only in cases where, taking due account of other relevant circumstances, the seriousness of the offense would make any other sentence clearly inadequate."

**Paragraph 2:** Many factors that the court must take into account in considering whether to impose an alternative penalty are considered under Article 51 on aggravating and mitigating factors and in Articles 35 and 36 on the fundamental principle and other principles relevant to penalties, respectively. The crux of Paragraph 2 is to direct the court to consider the appropriateness of an alternative penalty in light of the seriousness of the offense, the level of culpability of the convicted person (both required under the fundamental principle), aggravating and mitigating factors (required under Article 36[a]), and the character and individual circumstances of the convicted person. The last issue is important from the perspective of not only whether an alternative penalty is appropriate but also which one would be appropriate in light of the charac-

ter and circumstances of the convicted person. For example, a convicted person may be the sole money provider in a family, and he or she may be working more than full-time to earn money and is not deemed a safety risk to the community. In this case, a suspended sentence or semiliberty may be appropriate. It might not be appropriate to impose community service upon him or her, given that he or she may already work a large number of hours per week.

## Article 55: Suspended Sentence as an Alternative Penalty

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1. A suspended sentence is an alternative penalty.
2. When the court pronounces a penalty of imprisonment not exceeding three years, either for a single offense or for multiple offenses, it may then replace this principal penalty of imprisonment with a suspended sentence.
3. A suspended sentence means that a sentence of imprisonment has been imposed upon a convicted person; however, the court orders that the sentence of imprisonment will not be enforced, subject only to its potential revocation under Paragraphs 5, 6, and 11(b).
4. When the court decides to impose a suspended sentence instead of the principal penalty of imprisonment, the court must set a probation period for the convicted person. The probation period determined by the court must not be less than one year and must not be greater than five years.
5. If the convicted person commits a criminal offense and is convicted of this offense within the probation period or five years afterward, the court must revoke the suspended sentence. When the suspended sentence is revoked, the convicted person must be imprisoned and must serve the original penalty of imprisonment that was imposed upon him or her.
6. The court may revoke a suspended sentence and order execution of the penalty of imprisonment if, after the suspended sentence is imposed:
  - (a) the court learns that the convicted person perpetrated another criminal offense prior to the imposition of the suspended sentence and was convicted for this criminal offense within the probation period or five years afterward; and
  - (b) in the court's view, had the existence of the previously committed offense been known to the court, a suspended sentence would not have been merited.

7. In the event of revocation of the suspended sentence for prior or new criminal offenses under Paragraphs 5 and 6, the court must impose a joint penalty for both criminal offenses in accordance with Article 52.
8. In imposing the suspended sentence, the court may impose additional penalties under Article 59 and it may also require that the convicted person:
  - (a) undergo counseling or treatment for alcohol and other substance abuse or addiction;
  - (b) undergo mental health, including psychiatric or psychological, counseling or treatment;
  - (c) be prohibited from staying at designated places or areas;
  - (d) stay away from and refrain from contacting certain persons; or
  - (e) comply with any other obligations prescribed by law.
9. In imposing additional obligations under Paragraph 8, the court must determine the time limit for the performance of these obligations. The same time limits set out for the probation period in Paragraph 4 apply to these additional obligations.
10. The court may appoint a supervisory organ to monitor the convicted person's compliance with the additional obligations.
11. When the court has imposed one of the obligations listed in Paragraph 8, and the convicted person fails to perform that obligation within the time limit determined by the court, the court may:
  - (a) extend the time limit for the performance of the obligation; or
  - (b) revoke the suspended sentence and order execution of the penalty of imprisonment.

## Commentary

Pursuant to Article 55, it is possible for a person to be convicted and sentenced to imprisonment but never spend any time in detention, where the conditions in Article 55 are met. Article 55 contains a basic framework regulating issues surrounding suspended sentences, such as the setting of a probation period (Paragraph 4), revocation and breach of an order for a suspended sentence (Paragraphs 5–7 and 11[b]), additional orders to a suspended sentence (Paragraphs 8 and 9), and supervision of a suspended sentence (Paragraph 10).

## Article 56: Community Service as an Alternative Penalty

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1. Community service is an alternative penalty.
2. When the court pronounces a penalty of imprisonment not exceeding three years, either for a single offense or for multiple offenses, it may then replace this principal penalty of imprisonment with community service.
3. Community service means that a sentence of imprisonment has been imposed upon a convicted person, but the court orders that the sentence of imprisonment will not be enforced if the convicted person works, without monetary compensation, for a specific organization or institution for the purpose of benefiting the community.
4. The consent of the convicted person is required when the court wishes to impose the penalty of community service work upon him or her.
5. When the court decides to impose a community service order instead of the principal penalty of imprisonment, the court must set a specified number of hours of community service.
6. The specified number of hours of community service must not be less than 40 or greater than 340 hours.
7. The length of time in which community service should be completed must not exceed six months.
8. In imposing the penalty of community service work, the court must:
  - (a) determine the type of community service to be performed by the convicted person;
  - (b) designate a specific organization or institution for which the convicted person will perform the community service;
  - (c) decide what days of the week and hours community service will be performed, in consultation with the designated organization or institution; and
  - (d) appoint a supervisor to report back to the court on the performance of community service by the convicted person.
9. The court must revoke the order of community service and order the execution of the penalty of imprisonment if, during the duration of the community service term:
  - (a) the convicted person commits a criminal offense; or

- (b) the court learns that the convicted person had perpetrated another criminal offense prior to the imposition of the penalty of community service.
10. In the event of revocation of the penalty of community service for prior or new criminal offenses, the court must impose a joint penalty for both criminal offenses, in accordance with Article 52.
  11. If the convicted person fails to perform the community service work as determined by the court, the court may:
    - (a) extend the length of community service in accordance with the limits set out in Paragraphs 6 and 7; or
    - (b) revoke the penalty of community service and order the execution of the penalty of imprisonment.

## Commentary

More and more states around the world—both post-conflict and non-post-conflict states—are introducing community service as a form of penalty. In addition to making a convicted person take responsibility for his or her actions, community service provides compensation to society for harm done, as set out in Article 34, “Purposes of Penalties.” Community service may have a strong rehabilitative effect on a convicted person, a factor that is articulated as another purpose of penalties in Article 34. Council of Europe Resolution (76)<sup>10</sup> states that community service is a way “for the community to contribute actively to the rehabilitation of the offender by accepting his cooperation in voluntary work.”

Community service programs have been introduced particularly in states with chronic problems of prison overcrowding and other prison resource issues. Their effectiveness has been reported widely, as has the satisfaction of local communities with this form of penalty for a convicted person. The work that a person may undertake in the community is wide and varied and depends on the particular state in question. Community service is supported as an alternative penalty under the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules), paragraph 8.2(i), and by the United Nations Economic and Social Council in its Resolution 1998/23, paragraph 3(c). Annexed to the resolution is the Kadoma Declaration on Community Service, which came about as a result of the International Conference on Community Service Orders in Africa (1997). A plan of action and a network of national committees on community service were also implemented subsequently to the declaration.

Article 56 sets out the basic principles and procedures to be followed in imposing a penalty of community service. The most important thing to note about community service as a penalty is that it requires the consent of the convicted person. It is also important that the court assess the suitability of the person for community service based on the seriousness of the offense, his or her degree of culpability, community safety issues, and his or her character and personal circumstances. Once the court

considers the person suitable for community service and the person has consented to it, the court will then designate a certain number of hours that the convicted person will have to work (not exceeding 340 hours over six months), in addition to deciding what work he or she will undertake, for whom, and when (Paragraph 8). As stated in Paragraph 8(d), the community service program will be supervised. In general, a body is established to oversee and run the community service program once the penalty has been handed down. For a post-conflict state, this system has obvious resource implications, which should be considered prior to implementing legislation on community service measures. Adequate staff, premises, and funding should be provided to the body responsible for supervising the community service program.

As stated in Paragraph 9(a), a community service order will be revoked if the convicted person commits another criminal offense while undertaking the program. According to Paragraph 9(b), the order will be revoked if the convicted person has perpetrated another criminal offense prior to the imposition of the order for community service. When a community service order is revoked, the penalty of imprisonment that was originally imposed by the court is reactivated, and the person must serve the original penalty of imprisonment.

A community service order may also be breached when a person does not fulfill his or her duties under it. In such a case, the court may ask for either the extension of the community service order or execution of the original penalty of imprisonment, similar to revocation of the order (Paragraph 11).

## Article 57: Semiliberty as an Alternative Penalty

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1. Semiliberty is an alternative penalty.
2. When the court pronounces a penalty of imprisonment not exceeding three years, either for a single offense or for multiple offenses, it may then replace this principal penalty of imprisonment with semiliberty.
3. Semiliberty means that a sentence of imprisonment has been imposed upon a convicted person; however, the court orders that due to his or her obligations related to work, education, vocational training, or family, the convicted person may leave the detention center at defined times during the day. The convicted person must return immediately to the detention center after any obligations have been fulfilled.
4. The court may also order semiliberty to allow a person to attend medical or rehabilitative treatment.
5. If the convicted person does not perform his or her obligations related to work, education, vocational training, family, or medical or rehabilitative

treatment, the court must revoke the order for semiliberty and order execution of the remainder of the penalty of imprisonment.

## Commentary

Semiliberty as an alternative penalty is found in many states around the world. In some states it is called periodic detention. In essence, it means that a penalty of imprisonment is imposed upon a person but that he or she may leave the detention center at certain designated times to perform work-related activities, educational or vocational training, family responsibilities, or medical or rehabilitative treatment. In some states, a person may leave the detention center for the entire work week and will serve his or her penalty of imprisonment only on weekends. Under the MCC, a person may leave only during the hours of work and must return immediately upon completion of work.

The penalty of semiliberty may be used, for example, where the court believes a period of imprisonment is merited, but the person does not pose a safety threat to the community, the person is the sole earner in a family, and it would compromise the family as a whole if the person were held in prison, unable to work. It may also be used where the court wishes to support the person's efforts at education or his or her pursuit of a vocation, a factor that may assist in preventing him or her from committing future criminal offenses. The *Green Paper on the Approximation, Mutual Recognition and Enforcement of Criminal Sanctions in the European Union* (page 71) states another benefit of a penalty of semiliberty, in that it “seeks to offset one of the major disadvantages of prison, namely the desocialization of the prisoner. Compared with suspended sentence, detention with day release seems more successfully to reconcile the needs of rehabilitation and public protection.”

**Paragraph 4:** The MCC does not have a specific provision for rehabilitative programs, such as drug rehabilitation, except as part of an order for a suspended sentence under Article 55 and in the current article. Article 55 allows the court to impose a suspended sentence upon a person and then order the person to attend a drug or alcohol rehabilitation program. Article 57 allows the court to ensure enhanced supervision of the convicted person by placing him or her in prison, while at the same time focusing on the rehabilitation of the person through mandatory rehabilitative treatment.

## Article 58: Supplementation of a Principal Penalty with Additional Penalties

The court may impose one or more additional penalties in addition to a principal penalty.

## Commentary

Where the court has set a principal penalty of imprisonment and has considered the imposition of additional penalties, where applicable, it must turn to the question of whether to impose an additional penalty. The question for the court's consideration is whether the provision of additional penalties will fulfill the purposes of penalties set out in Article 34. While the court is required to give precedence to the fundamental principle over other purposes of penalties set out in Article 35, when it comes to additional penalties, the court is free to impose penalties that fulfill the other purposes of penalties. For example, a person may be imprisoned based on the seriousness of the criminal offense and his or her degree of culpability. However, if this penalty will not serve other purposes, such as the provision of reparations to the victim, the court may decide to impose an additional penalty of compensation to a victim under Article 62.

### Article 59: Supplementation of an Alternative Penalty with Additional Penalties

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The court may impose one or more additional penalties in addition to an alternative penalty.

## Commentary

The same issues arise regarding the imposition of additional penalties with alternative penalties as with their imposition with principal penalties. Reference should be made to Article 58 and its accompanying commentary.

### Article 60: A Fine as an Additional Penalty

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1. A fine is an additional penalty.
2. The court may impose a fine as an additional penalty for any criminal offense for which a fine is not expressly prescribed as an alternative principal punishment when the convicted person committed the offense for the purpose of obtaining undue material benefit.

3. In imposing a fine, the court must allow the convicted person a reasonable period of time in which to pay the fine.
4. The court may provide for payment of a lump sum or payment by way of installments paid at designated dates during a designated time frame.
5. In the case of willful nonpayment of a fine, where no penalty of imprisonment has been imposed, the court may order the convicted person to appear before it to explain the reasons for the nonpayment of the fine.
6. Where the convicted person, having been called before the court under Paragraph 5, continues to withhold the payment of the fine, the court may impose a term of imprisonment upon the person, not exceeding three months. Where a person is already serving a penalty of imprisonment, the court may extend the term of imprisonment by up to three months.

## Commentary

A fine may be imposed upon a person as a principal penalty under Article 50. Under Article 60, a fine may be imposed upon a convicted person where he or she is not subject to the principal penalty of a fine and where he or she has committed a criminal offense for the purpose of obtaining material benefit. The purpose of a fine as an additional penalty is to make the convicted person responsible for his or her criminal behavior, similar to the punitive effect of a fine as a principal penalty. For a more detailed discussion on fines and the method of calculating a fine, reference should be made to the commentary to Article 50. A default on the payment of a fine may result in an extension of the prison term for a person serving a term of imprisonment. For persons not serving terms of imprisonment, it is within the court's discretion to impose a penalty of less than three months' imprisonment (Paragraph 6).

## Article 61: Confiscation of Property, Equipment, or Other Instrumentalities Used in or Destined for Use in a Criminal Offense as an Additional Penalty

1. Confiscation of property, equipment, or other instrumentalities used in or destined for use in a criminal offense is an additional penalty.

2. The court may, without prejudice to the rights of bona fide third parties, order the confiscation of property, equipment, or other instrumentalities used in or destined for use in a criminal offense.

## Commentary

Article 61 involves the permanent deprivation of property, equipment, or other instrumentalities used in or destined for used in a criminal offense. The United Nations Convention against Transnational Organized Crime, Article 12(1)(b), and the United Nations Convention against Corruption, Article 31(1)(b), require states parties to introduce legislation allowing for this provision in relation to organized crime, corruption, and corruption-related offenses. The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Organized Crime (Article 6), specifically requires that firearms, their parts and components, and ammunition that have been illicitly manufactured or trafficked be confiscated. Similarly, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 5(1)(b), requires that narcotic drugs and psychotropic substances, materials and equipment, or other instrumentalities used in relation to drug offenses be confiscated.

The sort of confiscation envisaged in Article 61 is distinct from that of Articles 70–73, below, which provide for the confiscation of proceeds of crime and property to the value of the proceeds of crime. Articles 70–73 are not regarded as a “penalty” under the MCC but rather a mechanism that prevents a convicted person from enjoying the fruits of criminality or, worse still, reinvesting proceeds of crime into further criminal activity. Under Articles 70–73, the proceeds of crime or property of corresponding value may be confiscated. Under Article 61, property that was “used in or destined for use in” the criminal offense is the subject of the order. Confiscation under Article 61 is more of a penalty than the measure provided for under Articles 70–73. The practical ramification of this penalty, for example, is that a car usually used for personal use and used only once in the commission of a criminal offense could be confiscated as a penalty. Premises where drugs were illicitly manufactured could be confiscated even if the premises were also used for legitimate purposes. Computers belonging to and used by persons convicted of cybercrime offenses may also be confiscated under Article 61; restrictions may also be imposed on a convicted person’s use and possession of computers and access to the Internet. In addition to this sort of confiscation, Article 61 includes confiscation of more obvious objects used solely and directly in a criminal offense, such as narcotic drugs or a firearm used in a robbery.

The *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (page 146) states that the term *destined for use* in is “meant to signify an intention of such a nature that it may be viewed as tantamount to an attempt to commit a criminal offense.” Reference should be made to Article 27, “Attempt,” and its accompanying commentary.

For the definition of *property*, reference should be made to Article 1(8). Reference should also be made to the MCCP’s provisions regarding procedural issues related to

confiscation of property, equipment, or other instrumentalities used in or destined for used in a criminal offense.

One very relevant issue in relation to seizure of property is that of third-party claims to the property. Usually, third-party claims are determined in separate proceedings after the court has made an order for confiscation. The procedural provisions dealing with claims by bona fide third parties to property that is subject to an order for confiscation are dealt with under the MCCP.

Although confiscation provisions can be very useful, caution must be exercised in their implementation to prevent abuse. The court should exercise some restraint in what it confiscates. There is also a need to ensure that rules and procedures govern what happens to confiscated property, in case public officials with access to this property are tempted to sell it privately or use it personally. Reference should be made to the general commentary to Section 13 of the General Part of the MCC, which discusses this issue in greater detail.

## **Article 62: Payment of Compensation to a Victim as an Additional Penalty**

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1. Payment of compensation to a victim is an additional penalty.
2. In imposing the payment of compensation to the victim, the court must allow the convicted person a reasonable period of time in which to make the payment.
3. The court may provide for payment of a lump sum or payment by way of installments made at designated dates during a designated time frame.
4. In the case of willful nonpayment of compensation where a penalty of imprisonment has also been imposed by the court, and where all available enforcement measures have been exhausted, the court may extend the term of imprisonment for a period not exceeding three months.
5. In the case of willful nonpayment of compensation by the convicted person where no penalty of imprisonment has been imposed, the court may order the convicted person to appear before it to explain the reasons for the nonpayment of compensation.
6. Where the convicted person, having being called before the court pursuant to Paragraph 5, continues to withhold the payment of compensation, the court

may impose a term of imprisonment upon the person not exceeding three months.

## Commentary

The principles set out in Article 34 reference the compensation of victims as a purpose of penalties. Penalties that accrue to the state, such as imprisonment or fines, do not serve this aim. As the court must consider the just deserts principle in preference to the other purposes of penalties, the principal or alternative penalty must be geared toward fulfilling that aim. In deciding upon the appropriateness of an additional penalty, such as compensation to the victim, the court is entitled to look to this secondary aim of penalties set out in Article 34. The provisions of Article 62, in addition to compensating victims, also serve a deterrent effect and, according to some, a rehabilitative effect. Some of the experts consulted during the process of vetting the MCC emphasized the importance of victim compensation in their states and the consequential need to include a provision such as Article 62 in the MCC. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power requires that convicted persons, where appropriate, make fair restitution to victims, including payment for the harm or loss suffered (paragraph 8). The declaration urges states to review their practices, regulations, and laws to consider restitution as a sentencing option (paragraph 9). The MCC provides only for the payment of compensation to a victim. A post-conflict state may also wish to consider making provisions for the restitution, or return, of property that has been stolen or embezzled from the victim. To ensure that the penalty is effective and enforced, it is advisable that prior to ordering compensation, a court consider the ability of the convicted person to pay that compensation.

Despite the symbolic value of awarding compensation to the victim, the nonpayment of compensation may disappoint a victim greatly. If the convicted person does not have the means to pay the compensation, this may result in his or her imprisonment or the extension of a preexisting prison term. It is a matter for the court's discretion as to whether or not to impose a penalty of imprisonment in the case of willful nonpayment of compensation. Many domestic courts, after calling the convicted person before the court to explain the reasons for nonpayment and after reordering the payment of the compensation, often make the pragmatic choice not to impose a penalty of imprisonment on the convicted person. This decision is based on reticence to impose a penalty of imprisonment for the nonpayment of a monetary sum where it is infeasible to obtain the compensation.

## Article 63: Deprivation of the Right to Be Elected as an Additional Penalty

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1. The deprivation of the right to be elected is an additional penalty.
2. The court may deprive a convicted person of the right to be elected in national, regional, or local elections if:
  - (a) the convicted person was convicted of any criminal offense in connection with the elections, and a penalty of imprisonment was imposed on him or her; or
  - (b) a penalty of imprisonment for more than five years was imposed upon the convicted person.
3. When the court decides to impose the additional penalty of deprivation of the right to be elected, it must determine the time limit of the penalty. The length of the penalty must not be less than one year and not greater than five years from the day the judgment becomes final.
4. When the court imposes the additional penalty of deprivation of the right to be elected, in addition to the penalty of imprisonment or semiliberty, the time limit for the deprivation of the right to be elected starts when the person is released from imprisonment or semiliberty.

### Commentary

In certain cases, a court may decide that a convicted person should not stand for election for a set period of years after being convicted of a criminal offense. This provision applies to situations in which the person is found criminally responsible for any of the election offenses under Section 15 of the Special Part of the MCC or where a penalty of imprisonment of more than five years is imposed upon him or her. The rationale for this practice is to ensure that persons who have acted illegally with respect to elections in the past are separated from the object of their criminal offenses. The second class of persons to which this additional penalty applies, those sentenced to more than five years' imprisonment, consists of those who have committed a serious criminal offense or offenses and thus should not be eligible to take public office after an election.

## Article 64: Deprivation of the Right to Possess or Carry Firearms as an Additional Penalty

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1. The deprivation of the right to possess or carry firearms is an additional penalty.
2. The court may deprive a convicted person of the right to possess or carry firearms if the person:
  - (a) was convicted of any criminal offense committed by the use of firearms or any criminal offense related to firearms, such as the offenses listed in Section 13 of the Special Part of the MCC; or
  - (b) has committed a criminal offense involving violence for which the court imposed a penalty of more than three years' imprisonment.
3. When the court decides to impose the additional penalty of deprivation of the right to possess or carry firearms, it must determine the time limit of the penalty. The length of the penalty must not be less than one year or greater than ten years from the day the judgment becomes final.
4. When the court imposes the additional penalty of deprivation of the right to possess or carry firearms, in addition to the penalty of imprisonment or semiliberty, the time limit for the deprivation of the right to possess or carry firearms starts at the end of the term of imprisonment or semiliberty.
5. Where a convicted person who has served a term of imprisonment and is subject to an order under Article 64 violates the order not to possess or carry weapons during the time limit designated by the court under Paragraph 3, the convicted person may be prosecuted for the criminal offense of unlawful possession, control, or ownership of firearms, under Article 168, or for the criminal offense of failure to respect an order of the court, under Article 197.
6. Where a convicted person who is serving an alternative penalty violates the order not to possess or carry weapons during the time limit designated by the court under Paragraph 3, in addition to potential prosecution as set out in Paragraph 5, the court may also order that the alternative penalty be revoked and that the person must serve the original term of imprisonment imposed upon him or her. The court may also lengthen the duration of the order for deprivation of the right to carry firearms.

## Commentary

As discussed in the general commentary to Section 13 of the Special Part of the MCC, the right to possess and carry a firearm in a post-conflict state should be governed by laws or regulations on who is eligible to carry firearms, what firearms or weapons are subject to restrictions, and the procedure for obtaining a license to carry firearms. Reference should be made to the general commentary to Section 13 of the Special Part of the MCC. Irrespective of any restrictions under the legislation on firearms (or irrespective of whether any legislation exists), Article 64 allows the court to impose a prohibition on convicted persons carrying or possessing firearms for a designated period of time. The prohibition applies to persons who have perpetrated criminal offenses through the use of firearms or who have perpetrated violent criminal offenses and who, therefore, are manifestly unsuitable to carry or possess firearms.

## Article 65: Prohibition on Holding a Post as a Public Official as an Additional Penalty

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1. The prohibition on holding a post as a public official is an additional penalty.
2. The court may prohibit a convicted person from holding a post as a public official if the person:
  - (a) has abused his or her functions as a public official in connection with the commission of a criminal offense; or
  - (b) has committed a criminal offense for which the court imposed a sentence of more than five years' imprisonment.
3. When the court decides to impose the additional penalty of prohibition on holding a post as a public official, it must determine the time limit of the penalty. The length of the penalty must not be less than one year or greater than five years from the day the judgment becomes final.
4. When the court imposes the penalty of prohibition on holding a post as a public official in addition to the penalty of imprisonment or semiliberty, the time limit for the deprivation of the right to hold a post as a public official starts when the person is released from imprisonment or semiliberty.

### Commentary

Article 65 sets out a procedure and principles for prohibiting a convicted person from holding a post as a public official for a designated period of time. Reference should be made to Article 1(9) for the definition of *public official*. This sort of prohibition is particularly relevant for corruption and corruption-related offenses. In fact, Article 30(6) of the United Nations Convention against Corruption urges states parties to introduce penalties such as those in Article 65 into domestic legislation “to the extent consistent with the fundamental principles of [their] legal system[s].” Article 65 applies to a public official who has abused his or her position to perpetrate a criminal offense or has been sentenced to more than five years' imprisonment, meaning the offense was a relatively serious one. The court may consider the inappropriateness of these two classes of persons serving in the future as public officials, and it may then prevent this service for a designated period of time.

## Article 66: Prohibition on the Exercise of Managerial or Supervisory Positions in Private Legal Entities as an Additional Penalty

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1. A prohibition on the exercise of managerial or supervisory positions in private legal entities is an additional penalty.
2. The court may prohibit a convicted person from exercising managerial or supervisory positions if the person:
  - (a) has abused his or her functions as a manager or supervisor in connection with the commission of a criminal offense, and a penalty of imprisonment was imposed on him or her; or
  - (b) has committed a criminal offense for which the court imposed a sentence of more than five years' imprisonment.
3. When the court decides to impose the additional penalty of prohibition on the exercise of managerial or supervisory positions in private legal entities, it must determine the time limit of the penalty. The length of the penalty must not be less than one year or greater than five years from the day the judgment becomes final.
4. When the court imposes the penalty of prohibition on the exercise of managerial or supervisory positions in private legal entities in addition to the penalty of imprisonment or semiliberty, the time limit for the deprivation of the right to exercise managerial or supervisory positions in private legal entities starts when the person is released from imprisonment or semiliberty.

### Commentary

Article 66 sets out a procedure and principles for prohibiting a convicted person from exercising managerial or supervisory functions in a private legal entity. This additional penalty may be relevant, for example, to a person who has been convicted of embezzlement in a private entity, under Article 142. In fact, Article 30(6) of the United Nations Convention against Corruption urges states parties to introduce penalties like that in Article 66 into domestic legislation “to the extent consistent with the fundamental principles of [their] legal system[s].” Article 66 also applies more widely to persons who abused their functions in connection with a criminal offense and persons who have been sentenced to more than five years' imprisonment, meaning the offense was

a relatively serious one. The court may consider the inappropriateness of these two classes of persons serving in the future in managerial or supervisory positions in private legal entities, and it may then prevent this service for a designated period of time.

## Article 67: Expulsion of a Non-national as an Additional Penalty

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1. Expulsion of a non-national is provided for as an additional penalty in the MCC.
2. The court may order the expulsion of a non-national from [insert name of state] when the non-national has committed a criminal offense for which the court has imposed a penalty of imprisonment.
3. When the court decides to impose the additional penalty of expulsion of a non-national, it must determine the time limit of the penalty. The length of the penalty must not be less than one year or greater than ten years from the day the judgment becomes final.
4. When the court is determining whether to impose the additional penalty of expulsion of a non-national and the time limit of this penalty, it must take into account the following:
  - (a) the type and gravity of the criminal offense;
  - (b) the convicted person's motives for committing the criminal offense; and
  - (c) the convicted person's personal, family, economic, and social ties to [insert name of state].
5. The additional penalty of expulsion of a non-national must not be imposed if the execution of the expulsion would be contrary to international human rights standards regarding the expulsion of non-nationals.
6. The time limit for the order of expulsion commences from the day of the final judgment.
7. When the court imposes the penalty of expulsion of a non-national in addition to the penalty of imprisonment or semiliberty, the time limit for the expulsion starts when the person is released from imprisonment or semiliberty.

## Commentary

Article 67 allows the court to expel a person who is not a national of the state from the state for a designated period of time on account of his or her criminal behavior. This sort of additional penalty is contained in the criminal legislation of a number of states around the world.

**Paragraph 5:** The applicable domestic and international law on refugees should be taken into account when determining whether to expel a non-national from a state. International human rights law absolutely prohibits the expulsion (or *refoulement*) of a person where there is a threat of a violation of the right to life; of torture or cruel, inhuman, or degrading treatment or punishment; or other violation of that person's human rights that could cause irreparable harm.

# Section 12

## Subsection 4: Penalties for Legal Persons

### Article 68: Types of Penalties for Legal Persons

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The court may apply any combination of the following penalties upon a legal person:

- (a) confiscation of property, equipment, or other instrumentalities used in or destined for use in a criminal offense;
- (b) payment of compensation to a victim;
- (c) a fine;
- (d) confiscation of assets of the legal person;
- (e) termination of the legal person;
- (f) public announcement and publication of the judgment; and
- (g) prohibition of a specific commercial activity or activities, indefinitely or for a specified period of time.

### Commentary

Reference should be made to Article 19 and its accompanying commentary, which discuss the criminal liability of legal persons in more detail. The penalties provided for under Article 68 will all be carried out against a legal person rather than a natural person. Obviously, a legal person cannot be imprisoned. Therefore, a range of other penalties appropriate to legal persons have been included in Article 68. Some of these penalties under Article 68 (a fine; confiscation of assets; payment of compensation to

victims; confiscation of property, equipment, or other instrumentalities used in or destined for use in a criminal offense) are also provided for as applicable penalties for natural persons. The remainder (confiscation of assets, public announcement and publication of the judgment, prohibition of a specific commercial activity, or termination of the legal person) are specific to legal persons.

As mentioned in the commentary to Article 19, not every state has domestic legislation on the criminal liability of legal persons. Very often, legal persons are sanctioned through administrative or civil law. To compile the applicable penalties for legal persons in the MCC, comparative research was carried out on the sorts of penalties that exist in states that possess legislation on the criminal liability of legal persons. Reference was also made to the suggested list of sanctions for legal persons in the Council of Europe's *Recommendation R (88) 18 Concerning Liability of Enterprises Having Legal Personality for Offenses Committed in the Exercise of Their Activities*. The most commonly used penalty is a fine. However, the rest of the penalties outlined in Article 68 are also contained in domestic criminal legislation.

The penalties for a legal person are not divided into principal, alternative, and additional penalties. The court may impose any combination of these penalties, guided by the purposes of penalties set out in Article 34, the fundamental principle in Article 35, and the other principles applicable to penalties under Article 36.

In addition to the penalties set out in Section 12, the proceeds of crime, or property of equivalent value, may be confiscated from a legal person under Articles 70–73. Reference should be made to Articles 70–73 and their accompanying commentaries.

## Article 69: Determination of Penalties for a Legal Person

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1. When the court is determining an appropriate penalty or penalties for a legal person, the court must follow the principles set out in Articles 34–36.
2. When the court determines that the confiscation of property, equipment, or other instrumentalities used in or destined for use in a criminal offense is an appropriate penalty, it must apply Article 61.
3. When the court determines that payment of compensation to the victim is an appropriate penalty for a legal person, it must apply Articles 62(2) and 62(3).
4. When the court determines that a fine is an appropriate penalty for a convicted person, it must impose a fine that is no less than [insert monetary amount] and no more than [insert monetary amount].
5. The court may order the confiscation of a legal person's assets or the termination of the legal person only when:

- (a) the activity of the legal person was entirely or predominantly used for the execution of criminal offenses; and
  - (b) the penalty is justified by the presence of particularly aggravated circumstances.
6. The confiscation of the legal person's assets must not exceed one-half of the legal person's assets.
  7. The lawful interests of creditors and bona fide third parties must be taken into consideration when imposing the penalties of confiscation of assets and termination of the legal person.
  8. In the case of willful nonpayment of compensation to a victim under Article 62, the willful nonpayment of a fine under Article 68(c), or the prohibition on carrying out certain commercial activities, the court may subsequently impose another penalty upon the convicted legal person under Article 68.

## Commentary

Article 69 sets out some broad principles for the imposition of penalties upon a legal person. Where possible, reference has been made to the procedures for the imposition of similar penalties on natural persons under the MCC.

**Paragraph 5:** Given the fact that the termination of a legal person and the confiscation of its assets are very serious penalties, the MCC provides certain limitations on their imposition, namely that activities of the legal person were used either entirely or predominantly for the execution of criminal offenses (very common in relation to organized criminal activity) and that “particularly aggravated circumstances” be present. When the court orders the termination or winding up of the operation or functions of the legal person, the court must either designate a receiver to terminate the legal person or follow the legal mechanism for the termination of legal persons under the applicable domestic law.

**Paragraph 6:** As is the case with confiscation of property from natural persons, there must be a procedure for the storage and disposal of confiscated assets of the legal person. Reference should be made to the general commentary to Section 13 of the General Part of the MCC, which discusses this issue in greater detail.

**Paragraph 7:** The legal interests of bona fide third parties with potential interests in the assets and creditors to a legal person that is to be terminated must be dealt with under legislation. Ordinarily, their interests would be dealt with in proceedings separate to criminal proceedings. This situation is beyond the scope of the MCC. If not already in existence, legislative provisions should be introduced to address the grounds upon which a claim to the assets of a legal person may be made, as well as the procedures by which they are made and by which their validity is determined.

**Paragraph 8:** When a natural person defaults on a fine or the payment of compensation, he or she may be liable to imprisonment or an alternative penalty under the MCC. As imprisonment is not an option for legal persons, the court may subsequently revisit its original determination of the appropriate penalties and add to it.